VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANT,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED SEPTEMBER 24, 1956
JURISDICTION NOTED DECEMBER 3, 1956

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

COMPLAINT OF THE UNITED STATES OF AMERICA—
Filed December 2, 1955

Comes now the United States of America and for cause of action shows the following:

I.

This action is brought pursuant to the jurisdiction conferred upon this Court by Title 28, Sections 1331, 2201, 2281 and 2284 of the United States Code, for the purpose of having this Court declare that certain sections hereinafter more specifically referred to of the Public Utilities Code of the State of California are unconstitutional and void, and for the further purpose of having the Public Utilities Commission of the State of California permanently enjoined from taking any action under said sections. The subject matter of this action involves many millions of dollars.

II.

The United States of America, in the discharge of its sovereign powers and responsibilities conferred upon it by the Constitution of the United States, has established throughout the United States and foreign countries a number of installations, both civil and military. Many of these

establishments are primarily for the purpose of providing for the common defense in the light of the world-wide commitments of the United States in recent years. The various military establishments are interrelated and integrated into a general nation-wide or world-wide system designed to carry forward the logistical needs of the United States in the light of its broad strategic plan. Due to the fact that the ports of California are the approaches to the Orient, climatic, topographic, and other considerations, approximately 153 military installations are situated within its boundaries. This is the largest number of such establishments located in any single state. Certain of these instal- [fol. 2] lations are situated on land which was ceded by the State of California and accepted by the United States and held and operated under its exclusive jurisdiction, pursuant to Article I, Section 8, Clause 17, of the Constitution of the United States. In order to maintain the many establishments in California and to carry out the purpose for which they were created, it is necessary to move large amounts of supplies and material into the state from other states. It is likewise necessary in many instances to transfer such supplies and materiel from one installation to another within the state and frequently to transfer supplies, which either originated in the state or were sent into the state for storage, out of the state to foreign countries or installations in other states. Thus, in the year 1954 military traffic in California to and from and between the various installations located within the state amounted to 2,121,431 tons. The cost of moving the materiel was approximately 20 million dollars. In many instances the materiel thus moving into the state, between points in the state, and to points out of the state is commingled in the depot system situated throughout the state and moves in a general current or stream at a velocity and in directions determined by the exigency of particular situations.

III.

Since the creation of the Federal Government and the establishment of the Armed Services, it has been the practice in the moving of supplies and materiel for the United

States by common carrier for duly authorized officers or officials of the United States to negotiate rates for the Government shipments. This practice was found necessary due to the unique character of the shipments of Government supplies and materiel due to the fact that the commodities involved are in many instances not of the type in the flow of commercial traffic. Likewise, in many instances, such commodities move in a direction which is against the current of commercial traffic. In many of such shipments, time is of the essence and the shipment must be made on very short notice. Frequently, such shipments involve elements of secrecy necessary to the national de- [fol. 3] fense, and accordingly, it is important that the contract of carriage be especially arranged. Thus, when the Interstate Commerce Act was enacted in 1887 providing for the publication of uniform tariffs by common carriers in interstate commerce for the general purpose of eliminating discriminations and undue prejudices to persons and localities, Section 22 of the Act expressly recognized the long established practice and exempted shipments for the United States. It has been generally assumed that the powers and duties of the officers of the United States to make special arrangements for the transportation of property applied alike to interstate and intrastate shipments, and since the earliest times such contracts have been indiscriminately made on the assumption that state regulatory statutes requiring the publication of tariffs with respect to intrastate shipments had no application to shipments for the United States. Thus the present Act of Congress from which the officers of the United States derive their power to negotiate rates for transporting property for the United States makes no distinction with respect to interstate or intrastate shipments. *Federal property and Administrative Services Act of 1949,* Public Law 152, 81st Congress 1st Session, Sections 201 and 202, 63 Stat., at page 377.

IV.

For many years the State of California recognized the fact that the transportation of property for the United

States was unique and accordingly Section 530 of the Public Utilities Code of California exempted such transportation from the provisions of the statute relating to the filing of tariffs and approval of rates; and for many years shipments were made by the United States between points in California in accordance with the long established general custom of making special arrangements or contracts for the shipments. In July, 1955, the Legislature amended Section 530 of the Public Utilities Code and deleted from the section the express exemption for the general provisions of the Code of shipments of property of the United States. California Stat. 1955, Ch. 1966. This amendment likewise expressly provided that carriers could only grant reduced [fol. 4] rates to the United States with the *pre*mission and under conditions determined by the Commission. The United States avers that the application of Section 530 of the Public Utilities Code, as amended, to shipments made by it would completely disrupt the long established practice in making such shipments and would be contrary to the well grounded reasons for the practice referred to above. Thus, it would greatly impede the discharge by the United States of its cons*it*tutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the intelligence agents for foreign powers and might jeopardize the security of the United States. It would likewise greatly increase the administrative expense of the United States by requiring its officers and officials to disentangle certain commodities from the mass of commodities in the current of commerce to determine whether or not particular shipments were in fact intrastate. Further, since from the nature of things as previ*sou*ly stated, the movements for the United States are irregular and in directions other than those in commercial traffic, in many particular situations there would be no published rate other than the class rate covering such shipments. Since time would be of the essence, it would be impossible to obtain Commission approval of rates and, accordingly, shipments by the United States would be thrown into the class rate, which as applied to

such shipments is recognized as unrealistically high, because the density, volume and other characteristics of such shipments would normally entitle them to rates equivalent to the commodity rates negotiated by commercial concerns. Further, at times such shipments are moved from points outside of the State of California, thence to another point in California or to California ports for shipment overseas, or on a through rate under transit provileges from the originating point outside of the state to the port or other ultimate destination within the state. In many situations such materiel is intermingled in an indistinguishable mass with identical materiel without transit privileges. Any effort to apply the requirements of Section 530 of the Public Utilities Code of California, as *mane*ded, to shipments of this sort would only result in confusion, friction [fol. 5] and litigation for no good purpose.

V.

The United States avers that no useful pr*u*pose of the standpoint of the citizens of California can be served by requiring the common carriers in California to make shipments for the United States only in accordance with published tariffs or at rates approved by the Commission because from the nature of things the commodities involved are in no sense in competition with commodities shipped by commercial shippers. Therefore, there can be no discrimination or unreasonable prejudice to persons or localities if the United States follows the long established practice in California of making such shipments in accordance with special negotiated arrangements with the carriers. The United States further avers that in many instances there would be alternate routes for the shipment of various properties, one of which routes would cross state boundaries and therefore be in interstate commerce and not subject to the jurisdiction of the Commission. In such situations, the officers of the United states charged with the responsibility of making arrangements for such shipments might find that it would be more economical to ship by interstate route and accordingly many carriers in the State of California might be precluded from participating in such ship-

ments. The United States further avers that due to the myriad varieties of commodities shipped by the United States and the irregular patterns of the movements of such commodities, it would be virtually impossible for the carriers operating in California to completely anticipate the nature and direction of the movements in published tariffs, and, accordingly, as previously alleged, in many situations where time if of the essence, it might become necessary for the United States to ship under class rates which are unrealistically high under the circumstances. Such a situation could only lead to increased expense for the maintenance of the defense establishments, which in the end would have to borne by the taxpayers of the various states, including the State of California. The United States further avers that in the event the application of the new provisions would lead to a great increase in expense in the transportation of defense materiel consideration would have to be [fol. 6] given to the relocation of the depot system, and thus certain Government installations and operations within the State of California might very well be curtailed with some loss of employment to the citizens of California. In conclusion, the United States avers that the only persons in California who might benefit by the regulation of rates by the Commission for the shipment of Government property are certain carriers who for one reason or another are unable to compete for the traffic.

VI.

For the reasons above stated, the United States avers that insofar as Section 530 and related sections of the Public Utilities Code of the State of California prohibit carriers within the State of California from shipping property for the United States at rates different from those approved by the Public Utilities Commission of California, they are unconstitutional and void under Article VI, Section 2, of the Constitution of the United States in that:

1. For no valid reason within the police powers or other reserved powers of the State of California, they place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsi-

bilities under Article I, Section 8, Clauses 7, 12, 13, 16, 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States.

2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of the Congress of the United States pursuant to the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States.

3. They contravene the policy of Congress implicit in the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, 1st Session, Sections 201 and 202, 63 Stat. at page 377, *et seq.*, relating to the negotiation for the transportation of property for the United States and enacted pursuant to the power conferred upon Congress by Article I, Section 8, Clause 18, of the Constitution of the United States.

4. Insofar as the Public Utilities Code of California imposes penalties upon common carriers for failure to ship property for the United States at rates other than those approved by the Public Utilities Commission, it is repugnant to Amendment XIV of the Constitution of the [fol. 7] United States in that it is vague and undertain by virtue of the fact that it imposes upon the carriers the duty and necessity of resolving intricate questions of law and fact in the determination of what particular shipments of persons or property may be in intrastate commerce or interstate commerce.

VII.

For the reasons above stated, the United States avers that this controversy is real and of vital importance from its point of view within the intent of Title 28, Section 2201, of the United States Code, conferring upon this Court jurisdiction to determine and declare the rights, duties and responsibilities of all concerned under the above-mentioned section and provisions of the Public Utilities Code of California, and the United States further avers that the enforcement of the said section and related provisions and

regulations will cause immediate and irreparable injury to the United States in that:

(a) At the present time shipments of United States property within the state are being made in accordance with long established rates which have been negotiated throughout the years which the United States avers are reasonable and particularly suited to the unique shipments involved. If Section 530 of the Public Utilities Code is put into effect, this long established rate structure will be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission.

(b) The necessity of having rates for the Government approved by the Commission would entail added clerical and administrative work, which would not only be a burdensome interference to the United States in the discharge of its constitutional responsibilities, but would likewise add an additional expense.

(c) With the disruption of the existing rate structure by the application of the section, undoubtedly many particular shipments would be thrown into the class rate structure. Accordingly, the cost of transporting the property for the United States would be immeasurably increased from the very moment that the section was put into effect by the Commission. In the event that it was later determined that the State of California was without authority to regulate the rates for shipments of the United States ma- [fol. 8] teriel, the United States could not be compensated by bond or otherwise for the increased expense which would have resulted to it during the period in which the statute was enforced.

(d) Immediately upon the enforcement of the section, in many situations the United States might be compelled to reveal information in connection with particular shipments which for purposes of national security should be kept secret.

WHEREFORE, the United States respectfully prays:

(a) In Accordance with Section 2284(1) of Title 28, United States Code, the Judge of this Court immediately notify the Chief Judge of this Court who shall designate two other Judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

(b) In accordance with Title 28, Section 2284(3) of the United States Code, this Court grant a temporary restraining order and an interlocutory injunction and all appropriate process necessary to prevent and prohibit the Public Utilities Commission of the State of California from enforcing or attempting to enforce said provisions of the Public Utilities Code, as amended, until this cause is finally heard and determined on the merits.

(c) Upon final hearing of this action that judgment be entered declaring that insofar as Section 530 of the Public Utilities Code of the State of California and related provisions prohibit carriers within the state from shipping property of the United States at rates other than those approved by the Public Utilities Commission of the state it is unconstitutional and void, and that the Public Utilities Commission of the State of California be permanently enjoined from making any effort to prohibit the carriers within the state from negotiating and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers, and for such other relief as the Court may deem just and proper.

/s/ James E. Kilday, /s/ E. Riggs McConnell, Attorneys for United States Department of Justice.

/s/ Stanley N. Barnes, Assistant Attorney General, /s/ Lloyd H. Burke, United States Attorney.

[fol. 9] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—December 2, 1955

This cause came on to be heard on the attached affidavit and verified complaint herein, and it appearing to the court from the complaint that this action presents a constitutional issue of importance and that from the allegations in the complaint and the attached affidavit there is danger of immediate and irreparable injury to the plaintiff United States of America before notice can be served and a hearing had on the plaintiff's request contained in the complaint for an interlocutory injunction in that:

(a) At the present time shipments of United States property within the state are being made in accordance with long established rates which have been negotiated throughout the years which the United States avers are reasonable and particularly suited to the unique shipments involved. If Section 530 of the Public Utilities Code of California and related provisions are put into effect, this long established rate structure will be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission.

(b) The necessity of having rates for the Government approved by the Commission would entail added clerical and administrative work, which would not only be a burden-

some interference to the United States in the discharge of its constitutional responsibilities but would likewise add an additional expense.

[fol. 10] (c) With the disruption of the existing rate structure which has been applied by the carriers and the United States by negotiation, by the application of Section 530 of the Public Utilities Code of California many particulars shipments to be made by the Government would be immediately controlled by published tariffs or would be thrown into the class rate structure. Accordingly, the cost of transporting the property for the United States would be immeasurably increased from the very moment that the section was put into effect by the Commission. In the event that it was later determined that the State of California was without authority to regulate the rates for shipments of the United States material, the United States could not be compensated by bond or otherwise for the increased expense which would have resulted to it during the period in which the statute was enforced.

(d) Immediately upon the enforcement of the section, in many situations the United States might be compelled to reveal information in connection with particular shipments which for purposes of national security should be kept secret.

It Is Hereby Ordered that the defendant Public Utility Commission of the State of California, its agents and employees, are hereby restrained from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for the transportation of Government property.

It Is Further Ordered, that in accordance with the United States Code, Title 28, Section 2284(3) this temporary restraining order shall remain in force only until the hearing and determination of the full three-judge Federal Court on plaintiff's application for an interlocutory injunction.

It Is Further Ordered, that the above-named defendant appear and show cause before this Court on the 11th day of January, 1956, at 9:30 o'clock in the forenoon of said day,

or as soon thereafter as counsel may be heard, why an interlocutory injunction should not issue during the pendancy of this action, according to the prayer in the Bill of Complaint.

It Is Further Ordered, that the plaintiff cause a copy of this Order, together with a copy of said Bill of Complaint, to be served forthwith upon the defendant herein.

[fol. 11] Dated: December 2, 1955 at 2:55 P. M.

/s/ Oliver J. Carter, United States District Judge.

[fol. 12] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35101

[Title omitted]

VERIFICATION AND AFFIDAVIT IN SUPPORT OF TEMPORARY RESTRAINING ORDER—Filed December 2, 1955

Captain F. L. Haerlin deposes and says that he is the Assistant Chief for Transportation of the Bureau of Supplies and Accounts, Department of the Navy, that he has read the complaint in the above-entitled proceeding, that he is personally familiar with the matters therein stated, and that the same are true and correct to the best of his knowledge, information and belief.

For a number of years the Navy and the other armed services have made shipments within the State of California in accordance with especially negotiated rates with the carriers within the state. In the event Section 530 of the Public Utilities Code of the State of California, as amended by Assembly Bill No. 2480, Stat. 1955, Ch. 1966, and related provisions and regulations are put into effect on December 5, 1955, the long established rate structure will be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to make arrangements for a new rate structure which would meet the approval of the Public Utilities Commission of

California. With the disruption of the existing rate structure, immediately particular shipments made by the Government would be controlled by published tariffs under the provision of Section 530 of the Public Utilities Code and related sections, which would be unsuited to the unique requirements of such shipments, and in some instances such shipments would have to be made under the class rate structure which is unrealistically high, as it relates to certain Government tariffs. Thus, the cost of transporting property for the Government would be immeasurably increased from the very moment that rates and regulations under Section 530, as amended, would be put into effect [fol. 13] by the Commission.

Accordingly, in order to prevent immediate and irreparable injury to the United States, it is submitted that a temporary restraining order should be issued which would prevent and prohibit the Public Utilities Commission of California from taking any action to enforce said Section 530 of the Public Utilities Code, as amended, until such time as the court can explore the question of whether or not an interlocutory injunction should be issued.

/s/ F. L. Haerlin

Subscribed and sworn to before me, a Notary Public, this 29th day of November, A. D. 1955.

/s/ Beatrice B. Ennis, Notary Public, Arlington, Virginia. My commission expires: March 9, 1957.

(Seal)

[fol. 14] Return on Service of Writ (omitted in printing)

[fol. 15] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF MOTION TO DISMISS COMPLAINT—
Filed December 22, 1955

TO: Stanley N. Barnes, Assistant Attorney General of the United States
Washington, D.C.

TO: Lloyd H. Burke, United States Attorney
Post Office Building, 7th and Mission Streets
San Francisco, California

TO: James E. Kilday and E. Riggs McConnell,
Attorneys for the United States
Department of Justice
Washington, D.C., Attorneys for Plaintiff.

Please take notice that the undersigned will bring the attached motion to dismiss the complaint on for hearing before this Court at Room 244, Post Office Building, 7th and Mission Streets, San Francisco, California, on the 11th [fol. 16] day of January, 1956, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

/s/ Everett C. McKeage, /s/ J. Thomason Phelps,
/s/ William R. Roche, Attorneys for Defendant.

[fol. 17] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

BEFORE: Hon. Dal M. Lemmon, Circuit Judge, Hon. Louis E. Goodman, District Judge, Hon. Oliver J. Carter, District Judge.

MOTION TO DISMISS COMPLAINT—Filed December 22, 1955

The defendant moves the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction over the subject matter of the complaint for the reasons that:

(a) The complaint does not allege or describe "an actual controversy" within the meaning of 28 United States Code, Section 2201, and the plaintiff therefore is not entitled to a declaratory judgment.

(b) The plaintiff has failed to exhaust the administrative remedy available to it in a proceeding before the defendant Public Utilities Commission.

[fol. 18] (c) The complaint involves a matter, namely, the reasonableness of rates for the *intrastate* transportation of property by for-hire highway carriers between points within the State of California, which is within the primary jurisdiction of the defendant as an administrative agency of the State of California.

(d) The complaint requests the Court to restrain, suspend, and enjoin the operation of an order affecting rates chargeable by public utilities and made by the defendant as an administrative agency of the State of California, and such order does not and will not interfere with interstate commerce, and has been made after reasonable notice to all interested parties, including the plaintiff, and after hearing, and a plain, speedy, and efficient remedy may be had in the courts of the State of California, and this Court is prohibited by the so-called Johnson Act, 28 United States Code, Sec-

tion 1342, from granting the relief requested by the plaintiff.

(e) The complaint does not allege facts showing any irreparable injury to the plaintiff, and the plaintiff has an adequate remedy in a proceeding before the defendant Public Utilities Commission and before the courts of the State of California.

(f) The Court is required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California.

(g) The subject matter of the complaint involves rates for the *intrastate* transportation of property by for-hire highway carriers between points within the State of California, a subject matter which is within [fol. 19] the exclusive jurisdiction of the State of California.

2. To dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted.

/s/ Everett C. McKeage, /s/ J. Thomason Phelps,
/s/ William R. Roche, Attorneys for Defendant.

[fol. 20] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing)

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[fol. 26] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS COMPLAINT—Filed January 26, 1956

The defendant wishes to emphasize at the outset that the relief requested by the plaintiff in this case involves a matter of the greatest public concern, namely, the cardinal political principle of our dual form of government. The plaintiff seeks from this Court a final judgment that certain legislative action of the State of California is null and void because it infringes the sovereignty of the United States in violation of the Constitution of the United States.

Preliminary Statement

In order to define the questions involved in this case and to make clear the grounds of the present motion, it appears necessary to describe in a preliminary statement [fol. 27] some of the matters that form the background of the complaint. (Certain pertinent excerpts from statutes, tariffs, Commission decisions, and other public documents, are set out in the Appendix hereto and will be referred to by the designation "App. p. .....")

In California there are various kinds of for-hire carriers by motor vehicle. For purposes of regulation by the State of California, these carriers are classified in various ways, viz., by type of commodity transported, by whether they are common carriers or contract (private) carriers, and by the pattern or magnitude of their operations. For present purposes it is only the last named method of classification that needs to be discussed. Under California law the pattern or magnitude of a carrier's operations determines whether he shall be regulated as a public utility under the Public Utilities Act, or whether he shall be regulated as a highway carrier under the Highway Carriers' Act. (Both the Public Utilities Act and the

Highway Carriers' Act are codified in the Public Utilities Code.) If he operates "between fixed termini or over a regular route," he is a public utility subject to regulation under the Public Utilities Act (P.U. Code, Sec. 211(d), 213, 215, 216(a); App. p. 2, 1). As such he is required to obtain from the California Public Utilities Commission, the defendant here, operating authority in the form of a certificate of public convenience and necessity. He is generally called a "certificated carrier" and is required by law to file tariffs (P.U. Code, Sec. 486, 493; App. p. 1), and is prohibited (with certain exceptions) from assessing or collecting charges other than those named in his tariff (P.U. Code, Sec. 494; App. p. 1).

If a for-hire carrier by motor vehicle does not operate "between fixed termini or over a regular route" he is a "highway carrier" subject to regulation under the Highway Carriers' Act (P.U. Code, Sec. 3511; App. p. 1). As [fol. 28] such he is required to obtain merely a permit from the Commission for his operating authority (P.U. Code, Sec. 3571; App. p. 1), and is generally called a "permitted carrier." He is required by law to assess and collect charges no less than those established by the Commission as minimum (P.U. Code, Sec. 3664; App. p. 1). For the purpose of regulating this type of carrier, the Commission from time to time has established and promulgated minimum rate orders in the form of tariffs.

Generally, although by no means invariably, the operations of the certificated carriers are on a larger scale than those of the permitted carriers, and they are somewhat more firmly established financially.

Although these two types of carriers have different kinds of operating authority, and in other ways are regulated somewhat differently one from the other, they compete vigorously with each other for nearly all kinds of business; and they both compete with other forms of transportation, such as that furnished by the rails.

In order to equalize the conditions under which the various types of carriers compete with each other, there has been for many years a provision in the Highway Carriers' Act prescribing that the minimum rates established by the Commission for the regulation of permitted carriers

shall not exceed the rates of certificated or rail carriers (P.U. Code, Sec. 3663; App. p. 1).

For many years prior to 1955 there was a provision in the Public Utilities Act as follows:

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> "(a) Persons or property for the United States, state, county, or municipal governments, or for charitable or patriotic purposes, or to provide relief in cases of general epidemic, pestilence, or calamity.
>
> "(b) Property to or from fairs or expositions for exhibit thereat.
>
> [fol. 29] "(c) Contractors and their employees, material or supplies for use or engaged in carrying out their contracts with such carriers, for construction, operation, or maintenance work or work incidental thereto on the line of the issuing carrier, to the extent only that such free or reduced rate transportation is provided for in the specifications upon which the contract is based and in the contract itself.
>
> "Common carriers may also enter into contracts with telegraph and telephone corporations for an exchange of service." (P.U. Code, Sec. 530, prior to 1955 amendment.)

In order to equalize the conditions surrounding the competition for government traffic (at least the most important part of it, namely, Armed Forces traffic), the Commission, as a matter of policy, for a number of years prior to 1955, included in its minimum rate orders from time to time, a special provision whereby permitted carriers were allowed to "deviate from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States" (Minimum Rate Tariff No. 2, Item 20 Series; App. p. 1).

On June 3, 1954, a group of carriers organized into an unincorporated association called the "California Government Traffic Conference," who are engaged in the transportation of property for the Armed Forces of the United States, filed with the Commission a petition proposing the elimination of this special provision, reciting, among other

things, that "certain permit carriers have taken liberal and literal advantage of the 'equal opportunity to compete freely from a minimum rate standpoint for the movement of 'competitive government shipments.' In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and depressed rates are creating chaotic transportation conditions in the move- [fol. 30] ment of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic." The petition further recited that "the public interest and the preservation of a sound minimum rate structure requires that such practice be stopped and that the privilege [to deviate from minimum rates for Armed Forces traffic] be discontinued."

The petition requested that the matter be set for hearing, that evidence be received, and concluded with the prayer that the "Commission make such order as may be meet and proper in the premises."[1]

On June 17, 1954, an amendment to this Petition for Modification No. 34 was filed by the California Government Traffic Conference.[2] In this amendment the original request to eliminate the special tariff provision was modified into a request that this provision be changed so as to allow permitted carriers to deviate from the minimum rates "to the extent necessary to meet the rate of a common

---

[1] This petition was filed as "Petition for Modification No. 34 in Case No. 5432, and is set out in the Appendix commencing on page 43. Case No. 5432 is one of those continuing proceedings contemplated by Section 3738 of the Public Utilities Code (App. p. 2). It was originally commenced by the Commission on its own motion and is the proceeding in which the Commission established the basic minimum rate tariff for general commodities, this tariff being designated as Minimum Rate Tariff No. 2. From time to time various interested parties file petitions requesting modification of this basic rate order, and such a petition is usually entitled and docketed by the Commission as "Petition for Modification No. ...."

[2] This amendment to the petition is set out in the Appendix commencing on page 51.

carrier on file for use with the Armed Forces of the United States, pursuant to Section 530 of the Public Utilities Code."

On September 2, 1954, a prehearing conference upon this petition was held, at which numerous parties appeared, [fol. 31] including "C. T. Mayo for the Armed Forces, Bureau of Supplies and Accounts, Code HA.1, Navy Department, Washington, D.C."; and in the course of this prehearing conference, counsel for the petitioner agreed to furnish Mr. Mayo with certain information pertaining to the operations of the carriers who were members of the California Government Traffic Conference. It was also agreed at the prehearing conference that the matter should be set for hearing in San Francisco on November 3, 1954, and that November 4 and 5 would also be reserved for further hearing. (Notice of Hearing dated September 10, 1954; App. p. 48).

Public hearings were held as scheduled on November 3, 4 and 5, 1954. Among the appearances at the hearing was that of "Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense" (Decision No. 51047; App. p. 6).

On January 25, 1955, the Commission issued Decision No. 51047 upon Petition for Modification No. 34 (App. p. 6). In this decision the Commission found that "certain permit carriers have driven rates for the handling of [government] shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement of such goods. Such depressed and unreasonably low rates for government traffic are depressing the revenues of the carriers now and previously engaged in the handling of such traffic and if continued will create a burden upon other traffic."

The Commission also found in this opinion that permit carriers "should be permitted to deviate from the minimum rates specified in Minimum Rate Tariff No. 2 only to the extent necessary to meet a lower common carrier quotation to the Armed Forces of the United States providing such Armed Forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. Otherwise [fol. 32] there should be no limitation on the right of such permit carriers to deviate from said minimum rates in con-

nection with transportation of property for the Armed Forces of the United States."

It was also stated that "there is nothing in this record to indicate whether the Armed Forces of the United States will require common carriers to file such quotations with this Commission and in the absence of such showing we will not at this time revise the third paragraph of Item 20 Series. However, upon the filing of a supplemental petition for modification herein by the California Government Traffic Conference stating that the Armed Forces of the United States propose to require common carriers to file with this Commission quotations for the intrastate carriage within California of property for the Armed Forces of the United States and attaching to said supplemental petition a written statement from the Armed Forces of the United States expressing such intention, this Commission will issue a supplementary order hereto revising the third paragraph of Item 20 Series to read [in such a way as to authorize permitted carriers to] deviate from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States only to the extent necessary to meet a lower rate of a common carrier for the transportation of said property providing the Armed Forces of the United States notify this Commission in writing that common carriers are required by them to file such common carrier rates with this Commission in a form acceptable to the Commission. . . . In the event the Armed Forces of the United States do not notify this Commission in writing that common carriers are so required to file such rates with this Commission or revoke any such notice previously given, [permitted carriers] may deviate without limitation from the minimum rates named in this tariff in connection with [fol. 33] the transportation of property for the Armed Forces of the United States."

On March 11, 1955, the petitioner, California Government Traffic Conference, filed with the Commission a Petition for Reconsideration, Modification or Rehearing with respect to said Decision No. 51047 (App. p. 56). This petition recites, among other things, that "representatives of your petitioner have discussed with the Armed Forces the decision of your Commission and have requested of the Armed Forces that the Armed Forces give notice to this Commission that they require common carriers to file such quota-

tions with this Commission prior to their becoming effective. *Your petitioner has been unsuccessful in its endeavors to cause the Armed Forces to give such notice to your Commission, and your petitioner has been informed that the Armed Forces do not feel it is appropriate for them to give such a notice to your Commission and that they will not give such a notice to your Commission.*" (Emphasis added throughout.)

On May 3, 1955, the Commission granted a rehearing with respect to said Decision No. 51047 "to be held . . . at such time and place as may hereafter be designated." (App. p. 50).

Thereafter the California Legislature amended Section 530 of the Public Utilities Code. This amendment withdrew from those carriers subject to the Public Utilities Act, the privilege of transporting property for the United States and local governments at reduced rates, and empowered the Commission to permit such reduced rates to such extent and subject to such conditions as it considers reasonable (Stats. of 1955, Ch. 1966; App. p. 2). This amendment was to become effective September 7, 1955.

It should be noted, however, that the amended statute contains a provision for continuing the privilege in the certificated carriers to the extent necessary to enable them to meet any rates allowed to the permitted carriers. This pro-[fol. 34] viso in the statute was obviously intended to prevent the permitted carriers from obtaining any competitive advantage over the carriers subject to the Public Utilities Act. This proviso therefore had the effect of nullifying the withdrawal of the privilege, that is to say, it restored the privilege in part, so long as, and to the extent that, permitted carriers were authorized to charge less than minimum rates for Armed Forces traffic.

On August 10, 1955 a notice was sent to all interested parties giving notice of a rehearing on August 25, 1955, with respect to said Decision No. 51047 (issued January 25, 1955 on Petition for Modification No. 34) (App. p. 42).

On August 16, 1955, the Commission, in order to give effect to the Legislature's intent to lodge discretion in the Commission, cancelled the provision of the minimum rate order above described (Item 20 in Minimum Rate Tariff No. 2) that allowed permitted carriers unlimited authority to deviate from the minimum rates for the transportation

of Armed Forces traffic. This decision by its terms was to become effective on September 7, 1955, contemporaneously with the amendment to Section 530 of the Public Utilities Code (Decision No. 51832 in Case No. 5432; App. p. 15).

On August 25, 1955, a public hearing was held pursuant to the above described Notice of Hearing with respect to said Decision No. 51047 upon Petition for Modification No. 3., at which the appearance of "Clement T. Mayo, Commerce C nsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the U. S. Government" was entered, and at which the matter was "Taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of Decision No. 51832 . . . ." (Decision No. 51922; App. p. 18).

On August 26, 1955, the Department of Defense of the [fol. 35] United States Government, pursuant to such reservation, filed with the Commission a petition to postpone the effective date of said Decision No. 51832 (App. p. 29). Among other things, this petition states (paras. 9 and 10):

> "The Department of Defense is conducting negotiations with California Tariff Agencies to modify rate tenders in such a manner as to make them acceptable to the Department of Defense and *it is believed that differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated,* the Government is opposed to Decision No. 51832 becoming effective.
>
> "If Decision No. 51832 becomes effective September 7, 1955, after said date and until acceptable permitted carrier tenders are formulated and, where necessary *approved by this Commission,* military traffic of necessity will have to be transported by common carriers regardless of the adequacies or inadequacies of their services and the reasonableness of their tariff rates."

The petition concludes with the following prayer:

> "WHEREFORE, the Department of Defense respectfully urges that your Commission postpone the effective date of Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publications of permitted

carriers setting forth the actual rates to be charged the government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the government traffic pattern, which are *acceptable to your Commission.*"

On September 6, 1955, the Commission issued a new decision by which it ordered that "The third paragraph of Item 20E of Minimum Rate Tariff No. 2 . . . is *hereby* cancelled effective December 5, 1955 . . . ." (Decision No. 51922 in Case No. 5432; App. p. 18). The opinion states (App. p. 21):

"After careful consideration of the record, the Commission is of the opinion and finds that the effective date of the elimination from Minimum Rate Tariff No. 2 of the rule in Item 20 permitting transportation for the Armed Forces at free or reduced rates should be extended to December 5, 1955 in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended."

[fol. 36] By a petition filed November 21, 1955, the United States Department of Defense sought a further 60-day postponement (App. p. 37).

On November 29, 1955, the Commission denied this request for further extension (Decision No. 52287, in Case No. 5432; App. p. 24). In this decision the Commission stated:

". . . The Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed to the Commission for its consideration.

"The intent of the Legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. *This action will in no way preclude carriers from filing applications for*

such rate exceptions as they may consider to be just and reasonable."

As a result, the cancellation of the tariff provision, the effect of which would be the withdrawal from the certificated carriers of the privilege of transporting government traffic at free or reduced rates, and the withdrawal from the permitted carriers of the privilege of deviating from minimum rates for Armed Forces traffic, which the Commission had first ordered on August 16, 1955, was to become effective at 12:01 A. M. on December 5, 1955, which was a Monday. On the afternoon of the preceding Friday, December 2, 1955, the present complaint was filed, and a temporary restraining order, an interlocutory injunction, and a permanent injunction were requested, together with certain declaratory relief pursuant to Title 28, Section 2201 of the United States Code (App. p. 2).

It is important to note that there is not a single allegation in the complaint that the defendant Public Utilities Commission has done anything or has issued any order, or that it is about to do anything, or that it is about to issue any order, adverse to the plaintiff. The prayer, however, is, among other things, that "this Court grant a temporary [fol. 37] restraining order and an interlocutory injunction and all appropriate process necessary to prevent and prohibit the Public Utilities Commission of the State of California from enforcing or attempting to enforce said provisions of the Public Utilities Code, as amended, until this cause is finally heard and determined on the merits;" and that "the Public Utilities Commission of the State of California be permanently enjoined from making any effort to prohibit the carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers (sic) . . ."

It will be noted that the relief requested is prohibitory in form, the request being merely that the Commission be prevented, restrained, enjoined, and prohibited *from* doing certain things.

In the afternoon of Friday, December 2, 1955, shortly after the complaint was filed, counsel for the plaintiff applied to Judge Carter for a temporary restraining order in the form which had been prepared by the plaintiff. In the course of his argument he said:

> "The Public Utilities Commission has by order implemented this Section 530 of its Public Utility Code, and that order is to take effect at 12:01 a.m. on Monday, December 5th, so that if action is not taken as of today the section will be in effect as of a minute after midnight on Sunday." (Tr. p. 6, l. 2-6.)

Counsel was obviously referring to Decision No. 51922 (above referred to) which postponed until December 5, 1955 the cancellation of the tariff provision (above referred to) giving permitted carriers unlimited authority to deviate, for Armed Forces traffic, from the minimum rates established by the Commission.

The defendant was given an opportunity to be heard upon the question of whether the proposed restraining order should issue; and its counsel pointed out that "The Com- [fol. 38] mission has already issued certain orders which, merely by the lapse of time and complete inaction by the Commission, will become effective as of 12:01 Monday morning; . . . To put it another way, the carrier industry and the government . . . have had ninety days within which to prepare for the effectiveness of this order which the Commission has already entered. So that, as I say, if the Commission does nothing, that order will become effective; . . . Moreover, the Commission presumably, if it sought to comply with this Court's order, would have to convene and sign out a new order countermanding its present order, and give notice to thousands of carriers in the industry countermanding its present order." (Tr. p. 11, l. 13-15; Tr. p. 12, l. 1-3; 10-14.)

The following colloquy also took place:

> "Mr. Phelps: Yes. Well, my position is, Your Honor, what can the Commission do or what will Your Honor expect the Commission to do in compliance with the restraining order: Who is going to be restrained from doing what? That's what is not clear to me.

"The Court: The Public Utilities Commission, by the language of the temporary restraining order, I believe is restrained from carrying this order into effect.

* * * * *

"That is all that this order does, would be to say to the Public Utilities Commission, 'Stay it. Stay it for an additional' period of time,' and that will maintain the status quo, and I don't see any particular inequity in that. * * *

"Mr. Phelps: And do I understand, Your Honor, that you construe the order, which I have not yet seen, to mean that the Commission is to take immediate or all reasonably practicable steps to abate, so to speak, the effectiveness of that order?

"The Court: I do. I do, yes. I don't want to be equivocal about that at all.

"I am going to do everything in my power to see that it is carried out."

(Tr. p. 18, l. 16-23; Tr. 19, l. 18-22; Tr. 32, l. 20-25; Tr. 33, l. 1-3.)

Thereafter, in the afternoon of December 5, 1955, the Commission issued a decision to become "effective on the [fol. 39] date hereof," in which it was ordered that "the cancellation of the third paragraph of Item 20E of Minimum Rate Tariff No. 2 is hereby suspended until final disposition of the case of United States of America, Plaintiff vs. Public Utilities Commission of the State of California, Defendant, Civil Action No. 35101, now pending in the United States District Court for the Northern District of California, Southern Division, and until the further order of the Commission." (Decision No. 52317 in Case No. 5432; App. p. 26).

Questions Raised by Motion to Dismiss

The defendant moves the Court to dismiss the complaint on two principal grounds, viz., (1) lack of jurisdiction in this Court over the subject matter of the complaint, with seven reasons for this ground; and (2) failure of the complaint to state a claim upon which relief can be granted.

The questions raised by the defendant's motion may be defined as follows:

I. Whether this Court has jurisdiction over the subject matter of the complaint.

(a) Whether the complaint alleges or describes an "actual controversy" within the meaning of 28 United States Code, Section 2201, and whether the plaintiff is entitled to a declaratory judgment.

(b) Whether the plaintiff has failed to exhaust the administrative remedy available to it in a proceeding before the defendant Public Utilities Commission.

(c) Whether the complaint involves a matter which is within the primary jurisdiction of the defendant as an administrative agency of the State of California.

(d) Whether this Court is prohibited by the Johnson Act, 28 United States Code, Section 1342, from granting the relief requested by the plaintiff.

(e) Whether the plaintiff will suffer irreparable in- [fol. 40] jury in the absence of injunctive relief by this Court, and whether the plaintiff has an adequate remedy in a proceeding before the defendant Public Utilities Commission and before the Courts of the State of California.

(f) Whether the Court is required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California.

(g) Whether the subject matter of the complaint is within the exclusive jurisdiction of the State of California.

II. Whether the complaint states a claim upon which relief can be granted.

Argument

The effect of the defendant's motion to dismiss the complaint is to admit, for the purposes of the motion, those facts, but only those facts, that are well pleaded.

Yuba Consolidated Goldfields v. *Kilkeary*, C.A. Cal. 1953, 206 Fed. (2d) 884;
Olan Mills, Inc. of Tenn. v. *Enterprise Publishing Co.*, C.A. La. 1954, 210 Fed. (2d) 895.

I. *The Court Lacks Jurisdiction over the Subject Matter of the Complaint.*

The complaint alleges several bases for this Court's jurisdiction, viz., Sections 1331, 2201, 2281, and 2284 of Title 28 of the United States Code.

Section 1331 provides as follows:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

Section 2201 provides as follows:

"In a case of actual controversy within its jurisdic- [fol. 41] tion, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Section 2281 provides as follows:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board

or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Section 2284 merely provides for the composition and procedure of a three-judge court and need not be set out here.

The defendant has set out in its motion to dismiss seven reasons for the proposition that the Court has no jurisdiction over the subject matter of the complaint. These reasons will be argued here in the order in which they are set out in the motion to dismiss.

(a) *The complaint does not allege or describe an "actual controversy" within the meaning of 28 United States Code, Section 2201, and the plaintiff therefore is not entitled to a declaratory judgment.*

In the complaint the plaintiff "avers that the controversy is real." (Para. VII, p. 8) But no controversy *between the plaintiff and defendant is described.* As already stated, there is not a single allegation in the complaint that the defendant Commission has done anything or threatened to do anything adverse to the plaintiff. The essence of the complaint is in the allegations (Para. IV, p. 4) that "in July 1955 the Legislature amended Section 530 of the Public Utilities Code and deleted from the section the express exemption from the general provisions of the Code of shipments of property of the United States."; and that "This [fol. 42] amendment likewise expressly provided that carriers could only grant reduced rates to the United States with the permission and under conditions determined by the Commission.", followed by allegations that "the application of Section 530 of the Public Utilities Code, as amended, to shipments made by [United States] *would*" result in certain consequences.

But this does not describe an "actual controversy" with the defendant Public Utilities Commission within the meaning of the Declaratory Judgment Act.

Public Service Commission of Utah v. *Wykoff Co.* (1952), 344 U. S. 237; 97 L. ed. 291, and cases cited;

Public Utilities Commission of California v. *United Air Lines, Inc.* (1953), 346 U. S. 402; 98 L. ed. 140.

The Court therefore does not acquire jurisdiction over the subject matter of the complaint by virtue of Title 28, United States Code, Section 2201.

(b) *The plaintiff has failed to exhaust the administrative remedy available to it in a proceeding before the defendant Public Utilities Commission.*

As already stated, counsel for the plaintiff at the time he applied for a temporary restraining order represented to the Court that "the Public Utilities Commission has by order implemented this Section 530 of the Public Utility Code . . ." (Tr. p. 6, l. 2, 3) (although no mention whatever of any such order appears in the complaint), and Judge Carter stated that he construed the restraining order issued by him to require the Commission to abate the effectiveness of this order (Tr. p. 32, l. 20-25; Tr. p. 33, l. 1-3), whereupon the Commission did so to the best of its ability.

If it is proper (which is doubtful) to take cognizance, for purposes of this motion, of any order of the Commission, in view of the fact that the complaint says nothing about it, then the plaintiff had available to it an adminis- [fol. 43] trative remedy which it should have pursued instead of seeking relief from this Court. Its interests could have been fully safeguarded and preserved by taking advantage of the machinery afforded by California law to stay the Commission's decision of September 6, 1955, pending a test of its constitutionality. This decision (Decision No. 51922; App. p. 18) was to become effective September 26, 1955; and it was rendered in a proceeding in which, as already stated, the plaintiff appeared as a party. Under California law the plaintiff thereupon had a right to file with the Commission an application for rehearing (P.U. Code Sec. 3739, App. p. 3) which, had it been filed ten

days or more before the effective date of the Commission's order (i.e., on or before September 16, 1955), would have suspended the order until the application for rehearing was granted or denied (P.U. Code, Sec. 1733; App. p. 3). If the Commission had denied the application for rehearing, the plaintiff could have applied to the Supreme Court of California "for a Writ of Certiorari or Review for the purpose of having the reasonableness" of the Commission's decision "inquired into and determined" (P.U. Code; Secs. 3740, 1756; App. p. 3). In such a proceeding before the California Supreme Court, California law provides that the review shall include a determination of whether the Commission's order or decision violates any right of the petitioner under the Constitution of the United States (P.U. Code, Sec. 1757; App. p. 3); and that where the validity of the Commission's order or decision of the Commission "is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of the constitutional question shall not be final." (P.U. Code, Sec. 1760.)

California law also provides the means of obtaining [fol. 44] from the California Supreme Court a stay of a Commission order during the pendency of such a writ, including a temporary stay without notice or hearing, where irreparable injury would result in the absence of such relief (P.U. Code, Sec. 1761-1764; App. p. 4).

Under California law proceedings in the Supreme Court of California involving any order or decision of the Commission ". . . shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes, irrespective of position on the calendar . . ." (P.U. Code, Sec. 1767)

If the plaintiff should be aggrieved by any decision of the California Supreme Court, it then would have a direct right of appeal to the United States Supreme Court (28 United States Code, Sec. 1257(2); App. p. 3), pending which a motion to stay the judgment of the California Su-

preme Court could be addressed to the United States Supreme Court (Rule 18 of Revised Rules of the Supreme Court of the United States; App. p. 5).

In this way amended Section 530 of the Public Utilities Code and the Commission's action in connection therewith could have been tested as to their constitutionality by the court of last resort without ever having become effective, and the plaintiff would have suffered no injury whatever, irreparable or otherwise.

The plaintiff elected however not to pursue this course, presumably because the Commission's Decision No. 51922 granted the relief requested by the plaintiff in its petition of August 26, 1955, namely, a postponement of the effective date of the Commission's order of August 16, 1955, cancelling the tariff provision. This petition is highly significant for a number of reasons. First, it acknowledges (para. 10) the Commission's jurisdiction over the rates in question and, in effect, acquiesces in that jurisdiction; second, it discloses the plaintiff's confidence that it could accommodate itself to the new conditions and make the [fol. 45] necessary adjustments "within a relatively short time" (para. 9); third, it involves a voluntary election not to challenge the constitutionality of the California Legislature's 1955 amendment of Section 530 of the Public Utilities Code and of the Commission's action in connection therewith, and to take the benefit thereof.

It is plain, therefore, that the plaintiff has failed to exhaust the administrative remedy available to it, and the United States Supreme Court has declared that under such circumstances there is no right to relief in the Courts.

Alabama Public Service Comm. v. *Southern R. Co.* (1950), 341 U.S. 341; 95 L. ed. 1002;

Myers v. *Bethlehem Shipbuilding Corp.* (1937), 303 U.S. 41; 82 L. ed. 638;

Federal Power Commission v. *Arkansas Power & Light Co.* (1947), 330 U.S. 802; 803; 91 L. ed. 1261;

McCauley v. *Waterman S.S. Corporation* (1946), 327 U.S. 540, 543-545; 90 L. ed. 839, 841-843;

Endicott Johnson Corp. v. *Perkins* (1942), 317 U.S. 501, 507-510; 87 L. ed. 424, 428-430;
Rochester Telephone Corp. v. *U.S.* (1939), 307 U.S. 125, 130; 83 L. ed. 1147, 1152.

There is another course of action which was, and still is, available to the plaintiff whereby it could have obtained, and still can obtain, from the Commission relief from the minimum tariff rates established by California law for other shippers. It could negotiate reduced rates with the carriers who would be free to apply to the Commission for authority to assess them pursuant to the provisions of Section 530 of the Public Utilities Code, as amended (App. p. 2), and Public Utilities Code Section 3666 (App. p. 5). This is the course which the plaintiff first elected to pursue when it requested of the Commission a 90-day postponement of the effective date of the Commission's action to permit the negotiation of "mutually acceptable tenders" (App. p. 29). In denying the plaintiff's request for a second postponement of sixty days, [fol. 46] the Commission said that its action would "in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable." (App. p. 24)

Apparently a lack of diligence on the part of the plaintiff in negotiating new rate agreements with the carriers prevented the consummation of such agreements within the 90 days allowed by the postponement of the effectiveness of the Commission's action, but the opportunity to effect such agreements and obtain Commission approval is still open.

(c) *The complaint involves a matter which is within the primary jurisdiction of the defendant as an administrative agency of the State of California.*

The complaint alleges that "the application of Section 530 of the Public Utilities Code, as amended, to shipments made by [the United States]," among other things, would cause such shipments to be "thrown into the class rate, which, as applied to such shipments, is recognized as un-

realistically high, because the density, volume and other characteristics of such shipments would normally entitle them to rates equivalent to the commodity rates negotiated by commercial concerns."

To the extent that this allegation calls for a determination of whether or not "class rates" covering such shipments are "unrealistically high" because of certain alleged peculiar characteristics of such shipments, it calls for the exercise of an informed administrative judgment.

There are a number of cases in which the United States Supreme Court has described and applied the "primary jurisdiction doctrine." This doctrine is closely related to, but is distinct from, the doctrine that an available administrative remedy must be exhausted before relief can be obtained in the Courts, and requires that administrative [fol. 47] questions be determined by administrative agencies rather than by the courts.

Vom Baur, Fed. Admin. Law, Vol. I, Sec. 213.

The doctrine was established in the *Abilene Cotton Oil case (Texas and Pac. R. Co. v. Abilene Cotton Oil Co.* [1907], 204 U.S. 426; 51 L. ed. 553; 27 S. Ct. 350), and has been applied in a number of subsequent cases, of which *Far East Conference v. U.S.* (1951), 342 U.S. 570; 96 L. ed. 576, is an example. Other cases are collected in a note appearing in 94 Lawyer's Edition at page 806. A recent expression of this doctrine by the United States Supreme Court appears in the case of *Public Service Commission of Utah v. Wycoff* (1952), 344 U.S. 237; 97 L. ed. 291; 73 S. Ct. 236, where the Court stated (p. 246; L. ed. 297):

> "Even when there is no incipient Federal-State conflict, the declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review."

There are several reasons for the rule, viz.: (1) the necessity for the uniform determination of administrative questions such as the question of the reasonableness of a

rate; (2) the necessity that technical matters, involving the weighing of voluminous and conflicting evidence, be determined by a body of experts; and (3) the rule of separation of governmental powers requires that administrative remedies which are legislative in character, should be exhausted on administrative questions, which are likewise legislative in character, before judicial relief may be sought.

Vom Baur, Fed. Admin. Law, Vol. 1, Section 215, pp. 193-196.

All these reasons obtain here if the complaint is considered as requesting, as it appears to do, a determination by this Court of the question of whether the "class rates" established by California law for other shippers are "unrealistically high."

[fol. 48] (d) *This Court is prohibited by the Johnson Act, 28 U.S.C. 1342, from granting the relief requested by the plaintiff.*

The Johnson Act, 28 U.S.C. 1342, is as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "(2) The order does not interfere with interstate commerce; and,
>
> "(3) The order has been made after reasonable notice and hearing; and,
>
> "(4) A plain, speedy and efficient remedy may be had in the courts of such State."

All of these conditions are fulfilled here, to whatever extent cognizance is to be taken, for the purposes of this motion, of Commission orders upon the subject of rates

for the transportation of property for the United States Government.

(1) In substance the complaint alleges that certain action of the State of California is repugnant to the Constitution of the United States (paras. I, VI), and no reference is made therein to any order of the Commission. As already stated, however, such orders were in fact issued and this Court's temporary restraining order was interpreted by Judge Carter as requiring the Commission to abate its order issued September 6, 1955 (Decision No. 51922; App. p. 37) which cancelled (effective December 5, 1955) the tariff provision giving permitted carriers unlimited authority to deviate, for transportation of United States Government property, from the minimum rates established by the Commission.

It has already been explained above how, by virtue of the proviso in the 1955 amendment to Section 530 of the Public Utilities Code, the rates of certificated carriers for the [fol. 49] transportation of United States Government property were pegged, so to speak, to the rates authorized by the Commission for permitted carriers. The Commission's order in said Decision No. 51922, therefore, had the effect of withdrawing from both permitted and certificated carriers their former privilege of charging less for the transportation of property for the United States Government than for other shippers.

It has been above explained, also, that a so-called certificated carrier (properly called highway common carrier) is a public utility for all the *pur*poses of California law (Public Utilities Code Secs. 211(d); 213; 216(a); App. pp. 2, 1); and there is, therefore, no doubt that the Commission's order in said Decision No. 51922 was an "order affecting rates chargeable by a public utility and made by a state administrative agency" within the meaning of the Johnson Act.

The defendant submits also that permitted carriers, although regulated in California under the Highway Carriers' Act and distinguished from certificated carriers for certain purposes of regulation, nevertheless should be considered as public utilities within the meaning of the phrase "public utility" as used in the Johnson Act. As appears at

the outset of the Highway Carriers' Act, permitted carriers are engaged in "a business affected with a public interest," and are regulated in California for the purpose of serving public needs and objectives (P.U. Code, Sec. 3502; App. p. 2).

The order contained in Commission Decision No. 51922, as it affected permitted carriers, was therefore an "order affecting rates chargeable by a public utility and made by a state administrative agency."

(2) The order contained in Commission Decision No. 51922 does not interfere with interstate commerce. As already explained, this order had the effect of requiring both [fol. 50] permitted and certified carriers to assess, for the transportation of United States Government property, the same rates as they assess against other shippers, unless otherwise authorized by the Commission. Such rates, for permitted carriers, are those established in Minimum Rate Tariff No. 2. By its own terms this tariff is applicable only to "transportation of shipments between *all points within the State of California*" with certain exceptions not material here (Minimum Rate Tariff No. 2, Item 30; App. p. 5).

This provision in Minimum Rate Tariff No. 2 reflects the provision contained in the Highway Carriers' Act that "this chapter [containing the regulations for permitted carriers] shall not be construed as a regulation of commerce with foreign nations or among the several States, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States." (P.U. Code, Sec. 3506)

That part of California law governing certificated carriers and the Commission's regulation thereof, namely, the Public Utilities Act, provides that "neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States, . . ." (P.U. Code, Sec. 202)

It thus appears that the State of California has expressly recognized the constitutional limitations upon its power, and has made it plain that the Commission's delegated

powers do not operate upon interstate commerce unless authorized by the Constitution and laws of the United States. There can be no doubt therefore that the Commission's Decision No. 51922 affected rates only for transportation of United States Government property *between points within the State of California.* Wherever it can be shown that such property is moving in interstate commerce, such fact, *ipso facto*, gives rise to an exemption from any rates [fol. 51] established by California law, unless the contrary result is permitted under the laws of the United States.

(3) The description heretofore given of the history of the proceedings before the Commission leading up to Decision No. 51922 shows clearly that the order issued in said decision was "made after reasonable notice and hearing." A Notice of Hearing was sent to all interested parties on August 10, 1955, giving fifteen days notice of a rehearing on August 25, 1955, upon the petition of the California Government Traffic Conference (App. p. 42), and it is stated in the subsequent decision thereon that "public hearings were held . . . at San Francisco on August 25, 1955." (Decision No. 51922; App. p. 37)

(4) A description was given above under topic I (b) of the remedy available to the plaintiff before the Commission, and thereafter in the Supreme Court of the State of California, whence a direct appeal lies to the Supreme Court of the United States. It is clear from this description that this remedy is "plain, speedy and efficient."

For the foregoing reasons, the defendant submits that the Johnson Act prohibits this Court from granting or continuing the injunctive relief requested by the complaint.

The defendant further submits that the Johnson Act's clear-cut policy and prohibition are not to be circumvented merely by requesting a declaratory judgment as additional relief.

(e) *The plaintiff will not suffer irreparable injury in the absence of injunctive relief by this Court, but has an adequate remedy elsewhere; on the contrary, persons other than plaintiff have suffered, and will continue to suffer, irreparable injury as a result of this Court's granting the plaintiff's request for injunctive relief.*

The complaint alleges (para. VII) that the enforcement of California law will cause immediate and irreparable injury [fol. 52] to the United States for the following reasons, in substance:

(1) Disruption of long-established rate structure will cause "confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission."

(2) Added clerical and administrative work and additional expense.

(3) Shipments would be thrown into "class rate structure," resulting in increased transportation cost, for which the United States could not be compensated by bond or otherwise.

(4) The United States "*might* be compelled to reveal information in connection with particular shipments which for purposes of national security should be kept secret."

The defendant submits that none of these allegations is well pleaded. They are either vague, ambiguous, conjectural, or conclusions, and are not therefore admitted by the defendant's Motion to Dismiss.

The complaint says there will be "confusion and delay," but it is not clear who will be confused or what will be delayed. Nor is anything of substance added by the affidavit filed by the plaintiff in support of its request for a temporary restraining order.

The defendant objects particularly to the statement that "the United States *might* be compelled to reveal information in connection with particular shipments which for purposes of national security should be kept secret." Not only is this statement couched in conjectural terms and therefore not well pleaded for purposes of the complaint, but it is plainly intended to arouse in this Court fear and alarm for the nation's security. The defendant strenuously objects to the injection of such emotions into a proceeding of this kind.

The only thing approximating a clear, forthright allega- [fol. 53] tion of damage is the allegation that the enforcement of California law will result in increased cost and

expense to the United States. Assuming the truth of this allegation for purposes of defendant's motion, and assuming that the plaintiff will prevail on the ultimate question of whether California may regulate rates for transporting property of the United States Government, these assumptions nevertheless do not demand injunctive relief. It has already been described above in topic I (b) how the plaintiff could have tested in the United States Supreme Court the constitutionality of Section 530 of the Public Utilities Code, and of the Commission's action in connection therewith, without such legislative action ever having operated upon the plaintiff, with the result that the plaintiff would have suffered no injury whatever, irreparable or otherwise.

But there is still another way in which the interests of the United States could be fully protected without the exercise by this Court of the drastic injunctive remedy. The complaint describes (para. III) the practice of the United States to move its supplies and materiel by common carrier. Common carriers in California, as elsewhere, have a legal duty to accept and carry freight (Civil Code Section 2169; App. p. 2). The United States, through its authorized officers, is at liberty at any time to demand transportation service of these common carriers. If this Court had not issued its restraining order, the Commission's Minimum Rate Tariff No. 2 would have become controlling on the *permitted carriers*, and their own tariffs would have become controlling *on the certificated carriers*. But the United States would still be free to set up in actions at law, by way of defense against the carriers' claims for payment of minimum or tariff charges, all the arguments that it now advances here. In this way there would be no pecuniary damage whatever to the United States, and therefore nothing [fol. 54] for which it would need compensation, by bond or otherwise.

Such a favorable strategic position as that enjoyed by the United States should be contrasted with the position in which the carriers now find themselves as a result of this Court's restraining order, a position in which they will remain so long as an injunction continues.

It must now be assumed, for the purposes of this comparison, that the defendant will prevail upon the ultimate question of whether California can regulate rates for the transportation of property of the United States Government.

The California Government Traffic Conference in its above described Petition for Modification No. 34 (App. p. 43), represented to the Commission, and the Commission in its Decision No. 51047 found, that: "Certain permit carriers have driven rates for the handling of [Government] shipments to a *depressed and unreasonably low level*, thereby creating chaotic transportation conditions in the movement of such goods. Such *depressed and unreasonably low rates* for government traffic *are depressing the revenues of the carriers* now and previously engaged in the handling of such traffic and if continued will create a burden upon other traffic."

The action taken by the California Legislature and by the Commission was calculated to remedy this condition by requiring carriers to charge the higher level of rates established in the tariffs of certificated carriers and in Minimum Rate Tariff No. 2. If this Court had not issued its restraining order requiring the Commission to countermand its initial action, then, as of December 5, 1955, and thereafter, the carriers would have had not only the legal right but the legal duty to assess and collect rates at such higher levels. That right was forever and irrevocably lost when the Commission, in compliance with this Court's restraining order, indefinitely suspended the cancellation of a provision in [fol. 55] Minimum Rate Tariff No. 2, and thereby continued, for an indefinite period of time, the opportunity for some carriers to hold rates at a "depressed and unreasonably low level." When other carriers, in order to compete, assess these low level rates, and when, but for this Court's order, they would have had a right and a duty to collect higher rates, it is clear that they have suffered and continue to suffer, irreparable injury. In view of the allegations in the complaint that " . . . in the year 1954 military traffic in California to and from and between the various installations located within the State amounted to 21,121,341 tons. The cost of moving the materiel was approximately 20 mil-

lion dollars", it will be understood that the injury to the carriers is not only irreparable but is also of very great magnitude. The injury suffered since December 5, 1955 is irreparable; but the injury presently continues, and will continue every day that this Court's order remains in effect. It is within the Court's power to end this accumulation of damage to the carriers in California. The defendant respectfully urges the Court to do so by dissolving its restraining order forthwith and dismissing the complaint.

(f) *The Court is required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California.*

The United States Supreme Court has frequently had occasion to express and apply a principle which requires that Federal Courts abstain from restraining, enjoining, or otherwise interfering with action taken by a State in the exercise of its sovereign powers. This principle is a corollary of the fundamental political principle underlying our dual form of government.

This "doctrine of abstention" has been well expressed by [fol. 56] Mr. Justice Frankfurter in the case of *Railroad Commission of Texas* v. *Pullman Company* (1941), 312 U.S. 496, 500; 85 L. ed. 971, 974, as follows:

> " . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, [citing cases]. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. [citing cases] This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

The principle was also applied in the case of *Alabama Public Service Commission* v. *Southern R. Co.* (1950), 341

U.S. 341; 95 L. ed. 1002, as follows (pp. 349-351; L. ed. pp. 1008, 1009):

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.
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> • • • • •
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> "This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts . . . . On the contrary, it is but a recognition . . . that a federal court of equity . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer . . . .
>
> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

The doctrine of abstention was also invoked in the case of [fol. 57] *Pub. Serv. Comm. of Utah* v. *Wycoff Co.* (1952), 344 U.S. 237; 97 L. ed. 291. In this case the late Mr. Justice Jackson said (p. 247; L. ed. p. 298):

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system . . . . We have

disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the state affected. Alabama State Federation of Labor v. McAdory, 325 US 450, 89 L. ed. 1725, 65 S Ct 1385. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism . . . . ."

A recent case in which this doctrine was applied is the case of *Public Utilities Comm.* v. *United Air Lines, Inc.* (1953), 346 U.S. 402; 98 L. ed. 140, in which United Air Lines, Inc., filed a complaint in this Court against the Public Utilities Commission of the State of California, and in which *the United States (Civil Aeronautics Board) intervened as a party plaintiff*. The complaint alleged that the Commission was attempting to regulate commerce that was alleged to be within the exclusive jurisdiction of Congress. The requested declaratory and injunctive relief was granted in this Court by a three-judge Court. On appeal to the United States Supreme Court the judgment was reversed by a *per curiam* decision upon the authority of the above cited case of *Pub. Serv. Comm.* v. *Wycoff Co.*

The judicial policy underlying this doctrine of abstention is the same as the Congressional policy expressed by the Johnson Act, although not confined to cases in which the Johnson Act is applicable. (*Alabama Pub. Serv. Comm.* v. *Southern R. Co.* (1950), 341 U.S. 341, 350; 95 L. ed. 1002, 1009.)

State power is not to be lightly frustrated or rendered impotent by the interposition of federal authority. (*Davies Warehouse Co.* v. *Bowles* (1944), 321 U.S. 144, 153-155; 88 L. ed. 635, 642-643; *Palmer* v. *Massachusetts* (1939), 308 [fol. 58] U.S. 79, 82-85; 85 L. ed. 93, 96-99; *City of Yonkers* v. *United States* (1944), 320 U.S. 685, 690-691; 88 L. ed. 400, 403-405.)

In the present case the policy of Congress, as reflected in the Johnson Act, the judicial doctrine of abstention established by the United States Supreme Court, and the integrity of our dual form of government, all combine to require this Court to dismiss this complaint.

In the light of these fundamental principles, the defendant respectfully urges the Court to give careful consideration to the implications of the action which the plaintiff asks it to take. Such action involves a frustrating of the efforts of the State of California to remedy what was found to be "chaotic transportation conditions" in the large scale movement of government traffic at "depressed and unreasonably low rates," and the threat of a "burden upon other traffic."

The nullifying of such efforts is an infringement of the gravest character upon the sovereignty of the State of California, and strikes at the very roots of our dual system of government. Such injuries to State sovereignty are greatly aggravated when, as here, they are wholly unnecessary and purely gratuitous.

(g) *The subject matter of the complaint is within the exclusive jurisdiction of the State of California.*

The defendant earnestly hopes and believes that this Court will be persuaded, before reaching this point, that it should not entertain this complaint, and that it need not enter upon a consideration of the ultimate question of whether or not the State of California can lawfully regulate rates for the intrastate transportation of property of the United States in California.

If, however, the Court should be of the opinion that it should entertain and decide this ultimate question, then the defendant offers the following argument which it believes will conclusively demonstrate that the State of California [fol. 59] does have lawful authority to regulate such transportation.

The Penn Dairies Case

A case of paramount importance in a consideration of the ultimate question involved in the present case is *Penn Dairies, Inc.* v. *Milk Control Comm.* (1942), 318 U.S. 261; 87 L. ed. 748. In this case a milk distributor sold milk in Pennsylvania to the United States at a price lower than that fixed as minimum by an agency authorized by the State of Pennsylvania to fix prices for milk sold within the state. The agency therefore denied a new license to the distributor.

This denial was sustained by the Courts of Pennsylvania, *in which the United States Government was allowed to intervene.* On appeal the United States Supreme Court affirmed the judgment below.

On pages 268-271, Lawyer's Edition pages 753-754, the Court says:

"Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.

"Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article 1, § 8, cl. 12, and with the support of the supremacy clause, Article 6, § 2, could declare state regulations like the present inapplicable to sales to the government. [citing cases] But there is no clause of the Constitution which purports, unaided by congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

"We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. [citing cases] But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, [citing cases] and *the mere fact that non-discriminatory taxation or regulation of the contractor* [fol. 60] *imposes an increased economic burden on the*

government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. [citing cases]

"Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 PA Super Ct 270, 271, 24 A (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see Baldwin v. G. A. F. Seeling, Inc. 294 US 511, 79 L ed 1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v. King & Boozer, 314 US 1, 86 L ed 3, 62 S Ct 43, 140 ALR 615, supra; *or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A. R. Co. v. Lichtenberg, 176 Md 383, 4 A(2d) 734, supra;* or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in James Stewart & Co. v. Sadrakula, 309 US 94, 84 L ed 596, 60 S Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority

in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see Metcalf & Eddy v. Mitchell, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see Graves v. New York, 306 US 466, 483, 487, 83 L ed 927, 937, 59 S Ct 595, 120 ALR 1466.

"Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. • • • Our inquiry here, therefore must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with [fol. 61] any discernible Congressional policy."

The Court then pointed out (p. 271. L. ed. p. 754) that in order to show such a conflict, the United States Government relied on certain acts of Congress requiring competitive bidding in the purchase of supplies for the Army. The Court then proceeds to examine these statutes and concludes (pp. 272-273, L. ed. p. 755) that:

"• • • while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly

consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, * * *"

The Court continues as follows (pp. 274, 275, L. ed. p. 756):

"Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. * * *"

On page 275, L. ed. p. 756, the Court said:

"Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

The Court then refers to the United States Government's reliance upon a certain Army regulation in effect at the [fol. 62] time of the sale in question containing certain

instructions to contracting officers, and said (p. 276, L. ed. p. 757) that the statutes authorizing the Secretary of War to prescribe rules and regulations for procurement "give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price."

The Court concludes its opinion as follows (p. 278, L. ed. p. 758):

> "We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk Control Law to appellant Penn Dairies, Inc., by denial of its license application."

The defendant has cited the Penn Dairies case at length because of its authoritative description of the matters to be considered and the principles to be applied to cases like the present one.

The present complaint alleges that (para. VI, sub-para. 1) that Section 530 of the Public Utilities Code "and related sections" (whatever that means) "are unconstitutional and void under Article VI, Clause 2 [the supremacy clause] of the Constitution of the United States in that . . . they place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibility under Article I, Section 8, Clauses 7 [to establish post offices and post roads], 12 [to raise and support armies], 13 [to provide and maintain a Navy], 16 [to provide for the militia], and 17 [to exercise exclusive jurisdiction over the District of Columbia, forts and other federal

enclaves]." (See App. p. 64 for Constitutional provisions [fol. 63] referred to.)

The Penn Dairies Case quickly disposes of the allegation that the California statutes "place an unreasonable burden and impediment" upon the power of Congress to provide for the military establishment (Article I, Section 8, Clauses 12, 13 and 16), since that is the power which the United States claimed was infringed in that case.

The only thing in the complaint that is related to the power of Congress over federal enclaves is the description (para. II) of a number of military installations in California and the allegation that "these installations are situated on land which was ceded by the State of California and accepted by the United States and held and operated under its exclusive jurisdiction, pursuant to Article I, Section 8, Clause 17 of the Constitution of the United States." But nothing is said (or could be said) as to how California regulation of the rates of highway carriers for the transportation of property over California public highways to and from these installations infringes the exclusive jurisdiction of Congress over such installations.

There is nothing whatever in the complaint to show how the California statutes infringe the power of Congress to establish post offices and post roads (Article I, Section 8, Clause 7) and the defendant is utterly unable to understand why the complaint contains any reference to such power.

Nor is there anything whatever in the complaint to show how the California statutes pertaining to transportation rates over California public highways "place an unreasonable burden and impediment" on the power of Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States (Article IV, Section 3, Clause 2; App. p. 64).

The complaint also alleges (para. VI, sub-para. 2) that [fol. 64] the California statutes "place an unreasonable burden on interstate commerce" in violation of Article I, Section 8, Clause 3 of the Constitution of the United States (App. p. 64). A number of vague and half-hearted allegations are made in support of this conclusion. Thus it is said that " . . . it is necessary to move large amounts of supplies and materiel into the state from other states. It is likewise

necessary in many instances to transfer such supplies and materiel from one installation to another within the state and frequently to transfer supplies, which either originated in the state or were sent into the state for storage, out of the state to foreign countries or installations in other states;" and that "in many instances the materiel thus moving into the state, between points in the state, and to points out of the state is commingled in the depot system situated throughout the state and moves in a general current or stream at a velocity, and in directions determined by the exigencies of particular situations." (para. II)

It is difficult to understand just what the plaintiff means by these allegations. If they imply that the California statutes purport to regulate rates for property moving into or out of the state from or to another state or foreign country, it has already been shown above in topic I (d) that the California statutes by their own terms do not operate upon interstate or foreign commerce except as authorized by the laws of the United States. State regulation of intrastate rates and operations or carriers does not constitute a burden upon interstate commerce. (*Alabama Pub. Serv. Comm.* v. *Southern R. Co.* (1950), 341 U.S. 341; 95 L. ed. 1002.) On the other hand, if these allegations imply that a movement from one federal enclave in California to another federal enclave in California constitutes a movement in interstate commerce, then the contention is expressly refuted in the case of *Hughes Transportation, Inc.* v. *United* [fol. 65] *States* (1954), 121 Fed. Supp. 212, an important case about which more will be said hereinafter.

The makeweight reference to the Fourteenth Amendment contained in the allegations of paragraph VI, sub-paragraph 4, of the complaint, can be dismissed merely with the observation that even if they were true they might give rise to rights in the carriers, but not in the United States.

The complaint also alleges that the California statutes "contravene the policy of Congress implicit in the Federal Property and Administrative Services Act of 1949 . . . relating to the negotiation for the transporting of property for the United States and enacted pursuant to the power conferred upon Congress by Article I, Section 8, Clause 18 of the Constitution of the United States. [Power to make

all laws necessary and proper for carrying into execution the powers delegated to the United States.]" (App. p. 64).

The law referred to, viz., Federal Property and Administrative Services Act of 1949, now codified in part at 41 U.S.C.A., Section 251, et seq., and in part at 40 U.S.C.A., Section 471, et seq., provides for the procurement of services and property for agencies of the United States.

The United States Supreme Court in the Penn Dairies case considered certain procurement laws of the United States then in effect, and their historical antecedents, and found in them no discernible Congressional policy to abrogate local state regulations of contractors supplying goods or services to the United States.

The Penn Dairies case was decided, however, in 1942. Since that time Congress has enacted new legislation, the Department of Defense has been created, and new rules and regulations have been promulgated governing the procurement of goods and services by the United States Government. It becomes necessary therefore to examine these [fol. 66] new laws and regulations in the light of the principles and conclusions of the Penn Dairies case. When this has been done it will be seen that no substantial changes have been made in the presently effective procurement laws from those considered by the Court in the Penn Dairies case, and that the principles and conclusions of that case are still valid. In fact, it will be concluded that the new laws and the rules and regulations promulgated thereunder seem to have been framed in the light of the Penn Dairies case, and with a scrupulous regard for the integrity of local regulations.

At the present time there are two separate statutes and two separate sets of administrative regulations governing the procurement of goods and services by the United States. One of these is applicable to the military agencies, and the other, for the most part, to the non-military or civil agencies. Only the latter is specifically described in the complaint (Federal Property and Administrative Services Act of 1949). However, since they both contain expressions of Congressional policy toward local state regulation of contractors supplying goods and services to the United States, a policy of respect for such State regulation and an inten-

tion to maintain its integrity, both of these statutes and accompanying regulations will be discussed herein.

1. *Armed Services Procurement*

The Armed Services Procurement Act of 1947 (41 U.S.C.A. Sec. 151-162) and presently effective regulations thereunder show that the military agencies of the Defense Department may negotiate for supplies and services the prices of which are subject to state or local or federal regulation, such as gas, electric, and similar utility services, including interstate *and intrastate* transportation service, and that the Department of Defense is authorized to represent the military agencies in negotiations with local, state, [fol. 67] and federal regulatory bodies.

The Armed Services Procurement Act of 1947 was the first effort to modernize the purchasing and procurement procedures applicable to the Armed Forces. Its purpose is shown by the following statement from the Senate Committee report on the bill, quoted from U.S. Code Congressional Service (1948) at page 1049:

> "This bill, as amended, makes uniform *all* the laws and rules covering purchase procedures for the armed services and repeals many obsolete and diverse laws. It contemplates that the regulations issued under this act by the respective departments shall be as uniform as practicable and that the procedures established thereby will expedite the development of cross procurement and combined purchasing.
>
> "A quote from the House report presents their concept of the bill and applies equally to the bill as amended. The quotation is as follows:
>
> "'* * * * The bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the

Government of fair and reasonable prices for the supplies and services procured, and affords an equal opportunity to suppliers to compete for and share in the Government's business. * * * "

This Act, in section 151 of Title 41, U.S.C.A., provides in part, as follows:

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

"(1) determined to be necessary in the public interest during the period of the national emergency declared by the President or by Congress;

"(2) the public exigency will not admit of the delay incident to advertising;

* * * * * * *

"(10) *for supplies or services for which it is impracticable to secure competition;*

* * * * * * *

"(17) *otherwise authorized by law.*"

[fol. 68] The Senate Committee report previously referred to contains a detailed statement in regard to the exceptional categories named above under which no advertisement for bids will be necessary. Referring to "(17) otherwise authorized by law," the Committee report, in the Congressional Service at page 1062, said: "This paragraph preserves the authority to negotiate contracts conferred by permanent legislation not repealed by Section 11 of this Bill. Illustrative of such earlier laws are:

* * * *

"Act of September 18, 1940 (54 Stat. 954, as amended by 59 Stat. 606; 49 U.S.C. 65), among other things this Act authorizes the procurement of *transportation services* without advertising when the serv-

ices required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

Pursuant to authority conferred in the Act the Secretaries of the Army, Navy, and Air Force promulgated separate procurement regulations. Subsequently the General Services Administration published a code of regulations in Title 32 of the Code of Federal Regulations (C.F.R.), Chapter IV, Sub-chapter A, entitled Armed Services Procurement Regulation, Part 400. Part 400.101 stated that the purpose of the Sub-chapter was to set forth regulations issued by the Secretaries of the Army, Navy, and Air Force, to establish "uniform policies relating to the procurement of supplies and services under the authority of the Armed Services Procurement Act of 1947 . . . 41 U.S. Code 151-161 . . . or under other statutory authorization."

Subsequently, after the creation of the Department of Defense the Secretary of Defense promulgated regulations for his Department separate from those previously published by the General Services Administration, apparently as a result of an appropriation bill rider in the Department of Defense Appropriation Act of 1953 (providing that after its effective date the Department of Defense could not "obligate any funds for procurement, pro- [fol. 69] duction, warehousing, distribution of supplies or equipment, or related supply management functions, except in accordance with regulations issued by the Secretary of Defense"). See 41 U.S.C.A. Sec. 162. However, the regulations promulgated by the Secretary of Defense are virtually identical with the provisions of the Armed Services Procurement Regulations previously promulgated by the General Services Administration.

As of December 31, 1954, Title 32 of the Code of Federal Regulations was revised and renumbered so that Armed Services Procurement Regulations appear under Subtitle A (Department of Defense) as Chapter I thereof. Part 1, Subpart A, Section 1.101 is as follows:

"§ 1.101 Purpose of subchapter. This subchapter issued by the Assistant Secretary of Defense (Supply

and Logistics) by direction of the Secretary of Defense, and in coordination with the Secretaries of the Army, Navy, and Air Force, establishes for the Department of Defense uniform policies and procedures relating to the procurement of supplies and services under the authority of the Armed Services Procurement Act of 1947, Public Law 413, 80th Congress, as amended, 41 U.S.C. 151-161 (hereinafter referred to as 'the act'), or under other statutory authorization."

Part 1, Subpart C, entitled "Basic Policies," contains, among others, Section 1.301 which is as follows:

"§ 1.301 *Methods of procurement.* It shall be the objective of each Department to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered. The two principal methods of procurement are by means of formal advertising and by means of negotiation. Procurement shall generally be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, all in accordance with the detailed requirements and procedures set forth in Part 2 of this subchapter. Procurement may be effected by negotiation, however, when authorized by and conducted in accordance with the detailed requirements and procedures set forth in Part 3 of this subchapter. * * *"

Part 3 of Subchapter A, concerning "Procurement by negotiation," contains Section 3.210 pertaining to "supplies or services for which it is impractical to secure competition by formal advertising." This regulation gives the following illustration of circumstances with respect to which a [fol. 70] non-advertised or "negotiated" contract may be made:

"(e) Where the contemplated procurement is for electric power or energy, gas (natural or manufactured), water, or other utility services;"

"(j) When the contemplated procurement is for stevedoring, terminal, warehousing, or switching services,

and *when* either *the rates are established by law* or regulation or the rates are so numerous or complex that it is impractical to set them forth in the formal specification for a formal solicitation of bids;"

"(k) When the contemplated procurement is for *commercial or air transportation*, including time charters, space charters and voyage charters over trade routes not covered by common carriers (as to which, negotiation is authorized under the provisions of §§ 3.217 to 3.217-2 and Section 321 of Part III of the Interstate Commerce Act of September 18, 1940, 49 U.S. Code 65), and including services for the operation of Government-owned vehicles."

Further compelling evidence that the Congress intended that agencies of the United States, civil and military, should be subject to the jurisdiction of state and local regulatory authorities in the matter of rates to be paid for regulated *intrastate* transportation service appears in another statute and in the action taken thereunder by both the military and civil agencies. The statute referred to is not a part of the Armed Services Procurement Act of 1947 but is a part of the Federal Property and Administrative Services Act of 1949 (referred to in the complaint) which, for some purposes, appears to be applicable to procurement for the military as well as civil agencies of the Executive Branch of the Government, unless the Secretary of Defense otherwise orders. The statute referred to is now codified as 40 U.S.C.A. Section 481(a), the pertinent part of which is as follows:

"The Administrator [General Services Administration] shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

* * * * *

"(4) With respect to *transportation and other public utility services* for the use of executive agencies, *rep-*

resent such agencies in negotiations with carriers and other public utilities and *in proceedings involving car-*
[fol. 71] *riers or other public utilities before Federal and State regulatory bodies;* provided, that the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this Sub-section whenever he determines such exemption to be in the best interests of national security."

On October 14, 1954, the following notice by the Secretary of Defense was published (Federal Register, p. 6611):

"Department of Defense

"Office of the Secretary

"Exemption of Department from Certain Provisions Under Title II of the Federal Property and Administration Services Act.

"1. By virtue of the authority vested in me under Section 201 (a), Title II of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C.A. 481(a)) I have determined it to be in the best interests of national security for the Department of Defense to be exempt from action taken or which may be taken by the Administrator of the General Services Administration under Section 201(a) (1), (3) and (4) of said Act in (a) the prescription of policies and methods of procurement and supply of transportation and traffic management, (b) the performance of functions related to procurement and supply of transportation and traffic management, and (c) *the representation* in negotiations with carriers and *in proceedings involving carriers before Federal and State regulatory bodies* in transportation and traffic management.

"2. The department of Defense will continue to cooperate with the General Services Administration in transportation and traffic management matters of mu-

tual interest. In those instances in which the General Services Administration and Department of Defense have mutual interest ar common objectives the Department of Defense will continue to act jointly with the General Services Administration.

"3. This exemption shall become effective at 12:01 A.M., e.s.t., Oct. 2, 1954.

C. E. Wilson
Secretary of Defense"

From the foregoing it is clear that both Congress and the agencies to which it has delegated powers of procurement acknowledge that carriers performing intrastate transportation services for the Government are subject to regulation by "State regulatory bodies."

[fol. 72] The Administrator of General Services and the Secretary of Defense have given further tangible evidence that they consider procurement for the United States as subject to State regulation by frequently appearing before State regulatory bodies in rate-making proceedings. As noted in the Preliminary Statement set out above, the appearance of "Clement T. Mayo, Commerce Counse' Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense" was entered in the proceeding before the defendant Commission that gave rise to the present complaint.

Notices of the appearances of these agencies before other regulatory bodies are frequently published in the Federal Register. For example, on May 12, 1955 (Federal Register, page 2340), notices of such appearances before the Arkansas Public Service Commission and the Georgia Public Service Commission were published.

2. *Procurement for Non-military Agencies*

As already stated, a second important act of Congress involving procurement of services and property for agencies of the United States is the Federal Property and Administrative Services Act of 1949, now codified in part at 41 U.S.C.A., Section 251, et seq. (Public Contracts), and in

part at 40 U.S.C.A., Section 471, et seq. (Public Buildings, Property and Works).

This Act applies to the procurement of goods and services by the General Services Administrator and, for some purposes, as already stated, appears to be applicable to procurement for the Armed Forces, unless the Secretary of Defense otherwise orders (40 U.S.C.A., Section 481 (a) (4), pertinent portions of which were set out in the discussion of Armed Services Procurement). This Act (like the Armed Services Procurement Act of 1947) provides in part (41 U.S.C.A., Section 252(c)): "All purchases and contracts for supplies and services shall be made by advertising, . . . except that such purchases and contracts may [fol. 73] be negotiated by the agency head without advertising if—

. . . . . .

"(9) for supplies or services for which it is impracticable to secure competition

. . . . . .

"(14) *otherwise authorized by law.*"

The regulations promulgated by the General Services Administrator pursuant to this Act are not materially different from those pertaining to military procurement, and will not be set out here.

In the light of the foregoing, the defendant submits that there is nothing in either the Armed Services Procurement Act of 1947 nor in the Federal Property Administrative Services Act of 1949, nor in any regulations promulgated thereunder, indicating any policy of Congress or of any agency exercising powers delegated by Congress, to abrogate State regulation of goods and services procured for the United States. On the contrary, there are plain indications that Congress and its agencies acknowledge and submit to the jurisdiction of State regulatory bodies.

The Hughes Case

The ultimate question involved in the present case, namely, whether or not motor carrier transportation rates established by State law are binding upon the United States, has been recently decided in the affirmative by the United

States Court of Claims in *Hughes Transportation, Inc.* v. *United States* (May 4, 1954), 121 Fed. Supp. 212.

In this case the plaintiff, a motor carrier, contracted with the Department of the Army to transport explosive ammunition between two federal enclaves located in Kentucky. The plaintiff had previously filed with the Army a rate quotation for such shipments, but had not filed such quotation with the Kentucky Department of Motor Transportation for approval, as a result of which the plaintiff [fol. 74] was required, by Kentucky law, to collect the rates specified in a tariff established under Kentucky law. The plaintiff brought suit against the United States in the Court of Claims, seeking to recover the difference between what the defendant paid and either the amount due under the tariff, or the amount due under plaintiff's interpretation of its rate quotation. The defendant filed a counterclaim alleging various overpayments to the plaintiff. The parties agreed that the General Accounting Office should determine the precise amounts due and that cross motions for summary judgment were submitted to the court "for determination of the basic legal issues involved therein and the determination of such facts as are not in dispute," under a rule that contemplates the entry of an interlocutory judgment reserving any further questions of fact as to the total amounts involved in the recovery, if any.

The first thing the Court did was to dispose of the defendant's contention that the Commonwealth of Kentucky could not constitutionally regulate activity at, or transactions within, an enclave over which the United States had exclusive jurisdiction. The Court said (pp. 221, 222):

> ". . . Accordingly, since the contract was substantially and almost entirely performed outside the confines of the federal enclaves, we are of the opinion that it does not fall within the exclusive jurisdiction of the federal government. [citing cases] We do not agree with defendant that transportation over a State's highways between two federal enclaves, located within a single State, amounts to interstate commerce. . . .
>
> • • • • •

"We hold that the contract for the transportation in question involved shipments moving in intrastate commerce; that the performance of the contracts necessarily involved the exclusive use of Kentucky highways over which the Commonwealth of Kentucky and not the federal government has jurisdiction, and that Kentucky is not attempting to regulate activity at, or a transaction within, the federal enclaves, but rather the use of Kentucky highways outside such enclaves."

The Court then discussed certain other contentions of [fol. 75] defendant and held that the United States was bound like any other shipper by the laws of the Commonwealth of Kentucky. The Court said (p. 232):

"With respect to intrastate motor transportation contracts to be performed in a State which has enacted valid regulatory laws concerning the use of its highways and the making of transportation contracts, we are of the opinion that the United States, when it enters into such a contract, is bound like any other private shipper, by the provisions of such State law unless there is some constitutional or statutory impediment to State jurisdiction, or unless the subject matter of the contract is so essentially federal in character as to preclude State control thereof, or the application of State law thereto."

The Court then said (p. 233):

"Finally, the subject matter of the contract in suit is essentially local in character and concerns itself with matters over which the State should properly exercise exclusive jurisdiction. There would accordingly appear to be no impediment to this court's application of Kentucky law . . ."

On December 6, 1954, the defendant filed a motion requesting the Court to "reconsider and modify its opinion of May 4, 1954, and to vacate its judgment of October 5, 1954. It stated that there was an issue of fact remaining

to be tried, and moved the Court "for summary judgment in its favor, or, in the alternative, to refer this issue to a Commissioner for trial on the merits." In its brief in support of the motion, the defendant said: "While defendant does not agree with the Court's decision on the issues of law involved, this motion nevertheless is made within the framework of the legal principles enunciated by the Court in its decision of May 4, 1954. Defendant seeks by this motion to show that, even within such framework, justice requires that summary judgment be granted in its favor or that there be a trial on the merits."

On July 12, 1955, the Court ordered "that defendant's alternative motion be and hereby is granted, and this case is referred to Commissioner Wilson Cowen for the purpose of hearing and reporting on such competent evidence as [fol. 76] either party may desire to submit."

It is clear, however, that the granting of defendant's "alternative motion," i.e., to try a certain alleged issue of fact, does not involve a reconsideration by the Court of the principle of law expressed in its opinion of May 4, 1954, that the United States is bound like any other shipper by rates established by state authority.

Upon the authority of the Penn Dairies and Hughes cases, the defendant submits that the Court should decide that the State of California may lawfully regulate the rates to be charged by all carriers for the intrastate transportation within California of property of the United States and that for this reason, as well as for the other reasons adduced by the defendant, the complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the complaint.

II. *The Complaint Fails to State a Claim Upon Which Relief can be Granted.*

A second ground allowed by Rule 12(b) of the Federal Rules of Civil Procedure (App. p. 65) upon which the complaint should be dismissed, is that it fails to state a claim upon which relief can be granted.

The defendant has already pointed out certain deficiencies in the complaint such as the failure to describe an "actual controversy" between the plaintiff and the defend-

ant, and the absence of any reference whatever to any action taken or threatened by the defendant. There are additional defects however. Most of the allegations of the complaint are not well pleaded for one reason or another. They are either vague, or ambiguous, or conjectural, or irrelevant, or conclusions rather than specific allegations of fact. When the complaint is stripped of all the allegations that are deficient in one or more of these respects, the only things left are allegations that the California [fol. 77] Legislature amended Section 530 of the Public Utilities Code, and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. Even the second of these allegations is lacking in particularity. Assuming however, without conceding, that these two allegations are well pleaded, they do not furnish any basis for relief by this Court.

Summary of Argument

The defendant submits that the foregoing legal authorities conclusively demonstrate that this Court has no jurisdiction over the subject matter of the complaint because:

(1) The complaint does not describe an "actual controversy" between the plaintiff and defendant.

(2) The plaintiff has failed to exhaust its administrative remedy.

(3) The complaint involves a matter which is within the primary jurisdiction of the Commission.

(4) The Court is prohibited by the Johnson Act from granting the relief requested by the plaintiff.

(5) The United States will not suffer irreparable or any injury in the absence of injunctive relief by this Court; and such injunctive relief has caused and will cause, if continued, irreparable injury to others.

(6) The Court is required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California.

(7) California may lawfully regulate the rates of all carriers for the intrastate transportation within California of property of the United States, and the subject matter of the complaint therefore is within the exclusive jurisdiction of the State of California.

[fol. 78] The defendant submits also that the complaint fails to state a claim upon which relief can be granted.

Conclusion

It may be appropriate to state that a United States District Court is a court of limited jurisdiction and possesses only that jurisdiction which has been conferred upon it by the Congress.

Kline v. *Burke Construction Co.*, 260 U.S. 226, 233-234; 67 L. ed. 226;

People v. *Bruce* (C.C.A. 9th, 1942), 129 Fed. (2d) 421, 423; cert. den. 217 U.S. 678; 87 L. ed. 544.

The defendant urges the Court to recognize the rule that prohibits the striking down of a state statute by the federal authority merely because such action will promote convenience and efficiency.

Davies Warehouse Co. v. *Bowles* (1944), 321 U.S. 144, 153-155; 88 L. ed. 635, 642-643.

The Court must have been struck with the fact that for a period of many months, commencing as early as September 2, 1954, when a prehearing conference was held upon the petition of the California Government Traffic Conference, the United States was informed, through its counsel, Mr. Clement T. Mayo, of the plight of the California carriers engaged in the transportation of United States Government property, and of the efforts being made to alleviate their plight; and that when the California Legislature and then the Commission in 1955 formulated a remedy, the United States elected to comply, seeking, through Mr. Mayo, merely a 90-day extension of time within which to make the necessary adjustments, and declaring its confidence that such adjustments could be made "within a relatively short time"

(App. p. 33). Then, after Mr. Mayo's request for an additional 60 days had been denied by the Commission, the present complaint was filed, and at the eleventh hour this Court was asked to undo what the California Legislature and Commission had done, by declaring their acts uncon-[fol. 79] stitutional. The name of Mr. Mayo is conspicuously absent from this complaint. The Court may wonder, as the defendant does, what caused this about face.

The United States has supped at California's table, as an invited and honored guest. It now turns upon its host and ravishes its household. Gentle comity has been dealt a violent blow.

It is within the power of the Court to rectify this wrong. The defendant requests that its motion to dismiss the complaint, and the foregoing memorandum of points and authorities in support thereof, be considered by the Court as the defendant's response to the Court's order of December 2, 1955, to show cause why an interlocutory injunction should not issue.

Respectfully submitted,

/s/ Everett C. McKeage, /s/ J. Thomason Phelps,
/s/ William R. Roche, Attorneys for Defendant.

Dated: January 26, 1956

[fol. 80] APPENDIX TO MEMORANDUM

(In the references that follow only pertinent portions of certain statutes, decisions and tariffs are quoted.)

Section 213 Public Utilities Code. "'Highway common carrier' means every corporation . . . owning . . . any auto truck . . . used in the business of transportation of property as a common carrier for compensation over any public highway in this State between fixed termini or over a regular route . . .".

Section 216 Public Utilities Code. "'Public utility' includes every common carrier . . . where the service is performed for or the commodity delivered to the public or any portion thereof . . ."

Section 486 Public Utilities Code. "Every common carrier shall file with the commission . . . schedules showing the rates . . . for the transportation between termini within this State of persons and property . . ."

Section 493 Public Utilities Code. "No common carrier . . . shall engage or participate in the transportation of persons or property between points within this State, until its schedules of rates . . . have been filed . . ."

Section 494 Public Utilities Code. "No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property . . . than the applicable rates . . . specified in its schedules filed . . ."

Section 3511 Public Utilities Code. "'Highway Carrier' means every corporation . . . engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle . . ."

Section 3571 Public Utilities Code. "No highway contract carrier or radial highway common carrier shall engage in the business of transportation of property . . . without first having obtained from the commission a permit . . ."

Section 3664 Public Utilities Code. "It is unlawful for any highway permit carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission . . ."

Section 3663 Public Utilities Code. "In the event the commission establishes minimum rates for . . . highway permit carriers, the rates shall not exceed the current rates of common carriers by land . . ."

Item 20 Minimum Rate Tariff No. 2, California Public Utilities Commission. ". . . Radial highway common carriers, highway contract carriers . . . may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States . . ."

[fol. 81] *California Stats. 1955, Ch. 1966; Section 530, Public Utilities Code.*

"Every common carrier . . . may transport, free or at reduced rates: (a) Persons for the United States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes . . . *The commission may permit common carriers to transport property at reduced rates for the United States*, state, county, or municipal *governments, to such extent and subject to such conditions as it may consider just and reasonable.* Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers . . . "

Title 28, Section 2201, United States Code.

"Sec. 2201. Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Sec. 111, 63 Stat. 105."

Section 3738 Public Utilities Code. "In all proceedings instituted by or pending before the commission pursuant to this chapter, the commission may from time to time make such interim, interlocutory, or other orders as it deems advisable. No such order shall operate as a final determination of the proceeding, and the commission may at any time thereafter make such further orders as it deems advisable with respect to the matters considered and determined in the order or to other matters involved in the proceeding."

Section 211(d) Public Utilities Code. "'Common carrier' includes: . . . (d) Every highway common carrier and every

petroleum irregular route carrier operating within this State."

Section 215 Public Utilities Code. "'Between fixed termini or over a regular route' means the termini or route between or over which any highway common carrier usually or ordinarily operates any auto truck or other self-propelled vehicle, or any passenger stage corporation usually or ordinarily operates any passenger stage, even though there may be departures from such termini or route, whether such departures be periodic or irregular."

Section 2169, Civil Code of California.

"*Obligation to accept freight.* "A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry."

Section 3502 Public Utilities Code. The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public."

[fol. 82] *Section 3739 Public Utilities Code.* "After the making of an interim, interlocutory, or other order, any party to the proceeding or any stockholder or bondholder or other party pecuniarily interested in the highway carrier affected may file a petition for rehearing, within the time and for the reasons provided in Sections 1731 to 1736, inclusive. The commission may act upon the petition within the time and in the manner provided in Sections 1731 to 1736, inclusive."

Section 1733 Public Utilities Code. "Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application."

Section 3740 Public Utilities Code. "Any interim, interlocutory, or other order may be reviewed as provided in Sections 1756 to 1759, inclusive. Upon such review, only that portion of the record in the proceeding considered by the commission and upon which it acted in making the order sought to be reviewed, need be certified to and considered by the Supreme Court."

Section 1756 Public Utilities Code. "Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

Section 1757 Public Utilities Code. "No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the com-

mission on questions of fact shall be final and shall not be subject to review as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination."

28 U.S. Code, Section 1257(2) State courts; appeal; certiorari.

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity . . ." June 25, 1948, c. 646, 62 Stat. 929.

[fol. 83] *Section 1761 Public Utilities Code.* "The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of the writ the Supreme Court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision."

Section 1762 Public Utilities Code. "Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended the order suspending it shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage, but the Supreme Court may grant a temporary stay restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay when, in its opinion irreparable loss or damage would result to petitioner unless such temporary stay is granted. Such temporary stay shall remain in force only until the hearing

and determination of the application for a stay upon notice. The hearing of such application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice."

Section 1763 Public Utilities Code. "No temporary stay shall be granted by the Supreme Court unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a motion for a stay as provided in this article. Every such temporary stay shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed 10 days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay is granted without notice the matter of the issuance of a stay shall be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay."

Section 1764 Public Utilities Code. "In case the order or decision of the commission is stayed or a temporary stay granted, the order of the court shall not become effective until a suspending bond is executed and filed with and approved by the court, payable to the people of the State of California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all money which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained. The court, in case it stays or suspends the order or

[fol. 84] decision of the commission in any matter affecting rates or classifications, may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court prescribes, all sums of money which it collects from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended."

Section 3666 Public Utilities Code. "If any highway carrier other than a common carrier desires to perform any transportation accessorial service at a lesser rate than the minimum established rates, the commission shall, upon finding that the proposed rate is reasonable, authorize the lesser rate."

Item 30, Minimum Rate Tariff No. 2, California Public Utilities Commission. ". . . the rates in this tariff apply for transportation of shipments between all points within the State of California, . . ."

Rule 18, Revised Rules of Supreme Court of the United States.

"*Supersedeas on Appeal.*"

"1. Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court when action by that court is required by law, or, subject to paragraph 2 hereof, to a justice of this court, a motion to stay the enforcement of the judgment appealed from, with which, if the stay is to act as a supersedeas, shall be tendered a supersedeas bond which shall have such surety or sureties as said judge, court, or justice may require. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as this court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sums

as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the judge, court, or justice after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of any court wherein were had the proceedings appealed from, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

"2. Application hereunder to a justice of this court will normally not be entertained unless application therefor has first been made to a judge of the court rendering the decision appealed from, or to such court, or unless the security offered below has been disapproved by such judge or court. All such applications are governed by Rules 50 and 51."

[fol. 85] Decision No. 51047 in Case No. 5432—Petition for Modification No. 34—California Public Utilities Commission:

"Decision No. 51047

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5432, Petition for Modification, No. 34

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).

Edward M. Berol and *Lewis Clark*, for California Government Traffic Conference, petitioner.

J. C. Kaspar, for Motor Truck Association; *L. E. Osborne*, for California Manufacturers' Association; *Arlo D. Poe*, for Motor Truck Association of California; *T. A. L. Loretz*, Tariff Agent; *J. L. Beeler*, for Southwestern Motor Tariff Bureau; *Maurice A. Owens*, for Draymens Association of Alameda County, Pacific Motor Tariff Bureau; *H. L. Mathewson*, for Pacific States Motor Tariff Bureau; *A. F. Schumacher* and P. N. Kujachich, for Owens-Illinois Glass Co., Pacific Coast Division; *Jess E. Francis*, for Continental Freight Lines; *C. R. Nickerson*, for Pacific Coast Tariff Bureau; *Harry Marioneaux*, for Alves Service Transportation Co., All-State Transportation Co., and J. A. Nevis Trucking, Inc.; *Graeme Pexton*, for Constructors Transport Co.; *Harold F. Culy*, for Culy Transportation Co., Inc.; *E. J. Muzio*, for Miles & Sons Trucking Service and Miles Motor Transport System; *John W. Smith*, for Southern Pacific Company and Pacific Motor Trucking Company; *James E. Doyle*, for Doyle Draying Co.; *W. J. Pope*, for Aetna Freight Lines; *Peter Vinick*, for Lodi Truck Service and *Walter Alves*, for All-State Transportation Co., Inc.; and Alves Service Transportation Inc., interested parties.

Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense.

J. A. McCunniff, of the Commission's staff.

[fol. 86] OPINION

On June 3, 1954, petitioner California Government Traffic Conference filed Petition for Modification No. 34 in Case No. 5432 seeking to eliminate from Item No. 20 Series of Highway Carriers' Tariff No. 2 (now Minimum Rate Tariff No. 2) the paragraph reading as follows:

"Radial highway common carriers, highway contract carriers and household goods carriers may deviate

from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

On June 17, 1954, said petition was amended to provide that instead of eliminating the above-quoted paragraph it be amended to read as follows:

"Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States, *to the extent necessary to meet the rate of a common carrier on file for use with the armed forces of the United States, pursuant to Section 530 of the Public Utilities Code.*"

(Italicized portion constitutes addition.)

Public hearings were held before Examiner Wilson E. Cline at San Francisco on November 3, 4 and 5, 1954. The matter was taken under submission upon the filing of certain exhibits November 12, 1954.

California Government Traffic Conference is an association of all classes of highway carriers engaged in the transportation of property for the armed forces of the United States. Exhibit No. 13 lists its members as follows:

Aetna Freight Lines, Anaheim Truck & Transfer Co., Arrowhead Freight Lines, Ltd., Asbury Transportation Co., Bigge Drayage Co., California Cartage Company, Inc., Citizens Transportation Company, City Messenger Air Express Co., Coast Counties Express, Constructors Transport Co., Continental Freight Lines, Delta Lines, Inc., Doyle Draying Co., Empire Transportation Company, Fortier Transportation Company, Chas. P. Hart Transportation, Lodi Truck Service, Miles & Sons Trucking Service, Miles Motor Transport [fol. 87] System, Northern Transportation Co., Oregon Nevada California Fast Freight, Inc., Orr Tank Lines, Pacific Freight Lines, Paxton Truck Co., Sacramento Freight Lines, Inc., Sullivan Transportation Co., Valley Motor Lines, Inc., Ventura Transfer Co., Victorville-

Barstow Truck Lines, Warren Transportation Company and Western Transportation Company.

The paragraph in Item No. 20 Series of Minimum Rate Tariff No. 2 which petitioner is requesting to be modified was incorporated in said Item No. 20 Series by Decision No. 42031, dated September 14, 1948, in Case No. 4808. In said Decision, 48 Cal. P.U.C. 237, 239, the Commission stated:

> "From the evidence of record it is apparent that radial highway common, highway contract and city carriers are disadvantaged by the statutory privileges accorded only to common carriers in the transportation of government traffic. An equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments should be accorded all classes of carriers."

As justification for the proposed modification petitioner alleged in the amended petition herein:

> "Certain permit carriers have taken liberal and literal advantage of the * * * equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments * * *. In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic. That the public interest and t e preservation of a sound minimum rate structure requires that such practices be stopped and that the privilege accorded by Decision No. 42031 be discontinued."

In support of certain of these allegations, petitioner introduced evidence through various carrier and tariff agent witnesses.

The record does not show that the rates of any of the permit carriers for the handling of government shipments [fol. 88] are unlawful, but it does support a finding that certain permit carriers have driven rates for the handling of such shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement of such goods. Such depressed and unreasonably low rates for government traffic are depressing the revenues of the carriers now and previously engaged in handling such traffic and if continued will create a burden upon other traffic.

No evidence was introduced to show that the government is the largest single shipper of commodities moving between points in California, but the record does show that the volume of this traffic is very substantial.

The record further shows that various common carriers and permitted carriers represented at the hearing are willing to continue to offer to the government the freight (all kinds) rates in accordance with the formula arrived at through negotiation between the representatives of the government and the carriers.

The Commission staff witness made a brief statement respecting the administrative significance of petitioner's proposal. He pointed out that the Commission has previously held in Decision No. 20328, dated October 15, 1928, 32 CRC 296,307, that common carriers are not required to file with this Commission rates quoted under Section 530 of the Public Utilities Code for transportation for the United States, state, county, or municipal governments. In the absence of a filing of such quotations with this Commission practical difficulties will be experienced both by the Commission and its staff and the carriers and the public in ascertaining those quotations which are below the level of the minimum rates otherwise established in Minimum Rate Tariff No. 2.

The Commission staff witness also pointed out a further difficulty. The proposal of the petitioner would place a [fol. 89] restriction on the ability of highway permit car-

siers to initiate lower rates thus leaving the entire initiative to the common carriers. In those instances where closed bids were filed with the government a common carrier could bid below the established minimum rate whereas a highway permit carrier could not safely do so.

In order to meet the administrative problems posed by the Commission staff witness, petitioner suggested (1) that common carriers be required to file copies of their rate quotations governing the transportation of the property for the armed forces of the United States in the same manner that is specified in Tariff Circular No. 2 and General Order No. 80, and (2) that permit carriers be required to show on their freight bills the source of any rate extended to the armed forces which is below that specified in Minimum Rate Tariff No. 2.

The record shows that the armed forces are required to ship goods via the carriers which offer them the lowest rates. Where several carriers offer the same rates the business is allocated among them on an equitable basis after a review of the schedule of facilities listed by each of the carriers.

Clement T. Mayo, Commerce Counsel representing the Department of Defense, stated the position of Department of Defense as follows:

> "Our position as stated in the opening of the proceeding is that we are appearing as our interests may appear. We are not, based on the evidence that has gone in so far, opposed to the petition as it now stands. We certainly will be opposed to the petition as it was originally filed. Our position in these proceedings and the position we have taken through all the proceedings that we have been in in rate matters is that the Department of Defense is in agreement with the National Transportation Policy as declared by the Congress of the United States and is in favor of reasonable rates on a stabilized basis, and of a sound transportation system to meet the needs of commerce in the national defense. Healthy competition is the life of trade and desirable, particularly in the transportation [fol. 90] field. But unethical competition can be ex-

tremely detrimental to the industry and can seriously hamper the type of transportation service that is imperative to the defense of our nation and for the waging of war. The Department of Defense seeks rates and rate adjustments only after a thorough analysis of the rate making factors surrounding the particular transportation involved and after it determines that the existing rates are excessive based on sound rate-making principles and the circumstances of the instant case * * *"

Witness Alves who is president of Alves Service Transportation, Inc., and All-State Transportation, two of the carriers whose volume of governmental traffic has recently been increased by reason of the lowering of rates, stated that he thought the modification of Item No. 20 Series as proposed would be a very fine thing providing there was enough competition in the common carrier field to serve the military bases. Mr. Marioneaux engaged in extensive cross-examination of petitioner's witnesses throughout the hearing and at the conclusion stated that that he concurred basically in Mr. Alves' statement. He further stated that he was fully in accord with some corrective measure that would establish minimum rate charges for government traffic as well as for commercial traffic but that he did not believe that the granting of the petition was the proper manner in which to achieve such objective. Mr. Marioneaux suggested that the Commission give this matter further study particularly with respect to assuring the government that there will be a multiplicity of common carriers serving the routes over which military freight is transported.

All other carrier participants in the proceeding, the tariff agents, the California Manufacturers' Association and the Los Angeles Chamber of Commerce were in favor of the modification of Item No. 20 Series as proposed.

The record shows that in those cases where closed bids are sought from carriers and a contract for transportation is awarded by the government to the low bidder it would be manifestly unfair not to allow permit carriers to bid [fol. 91] for the business on the same basis as common

carriers. If notice of quotations filed by common carriers with the armed forces is given to permit carriers through the filing of such quotations with this Commission prior to their effective date, the permit carriers can compete on an equal basis with the common carriers without the necessity of their being authorized to initiate quotations below the minimum rates specified in Minimum Rate Tariff No. 2. The manner in which quotations from carriers are sought by the armed forces is a matter within the discretion of the armed forces, however.

We hereby find that radial highway common carriers, highway contract carriers and household goods carriers should be permitted to deviate from the minimum rates specified in Minimum Rate Tariff No. 2 only to the extent necessary to meet a lower common carrier quotation to the armed forces of the United States providing said armed forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. Otherwise there should be no limitation on the right of such permit carriers to deviate from said minimum rates in connection with transportation of property for the armed forces of the United States. There is nothing in this record to indicate whether the armed forces of the United States will require common carriers to file such quotations with this Commission and in the absence of such showing we will not at this time revise the third paragraph of Item 20 Series. However, upon the filing of a supplemental petition for modification herein by the California Government Traffic Conference stating that the armed forces of the United States propose to require common carriers to file with this Commission quotations for the intrastate carriage within California of property for the armed forces of the United States and attaching to said supplemental petition a written statement from the armed forces of the [fol. 92] United States expressing such intention, this Commission will issue a supplementary order hereto revising the third paragraph of Item 20 Series to read as set forth in Appendix "A" attached hereto.

ORDER

Based upon the evidence of record and upon the conclusions and findings contained in the preceding opinion,

It Is Hereby Ordered:

1. That at any time within six months from the date hereof petitioner California Government Traffic Conference may file a supplemental petition for modification pursuant to the views and suggestions set out in the above opinion, whereupon this Commission will issue a supplemental order herein revising the third paragraph of Item 20 Series of Minimum Rate Tariff No. 2 to read as set forth in Appendix "A" attached hereto and made a part hereof.

2. In the event such supplemental petition for modification is not filed within six months from the date hereof, that Petition for Modification No. 34 be denied without further order of this Commission.

This order shall become effective twenty days after the date hereof.

Dated at Los Angeles, California, this 25th day of January, 1955.

Peter E. Mitchell, President.
Justus F. Craemer, Ray E. Untereiner, Matthew J. Dooley, Commissioners.

Certified as a True Copy
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

[fol. 93] APPENDIX "A"

(Revised Paragraph 3 of Item 20 Series
Minimum Rate Tariff No. 2)

Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the

transportation of property for the armed forces of the United States only to the extent necessary to meet a lower rate of a common carrier for the transportation of said property providing the armed forces of the United States notify this Commission in writing that common carriers are required by them to file such common carrier rates with this Commission in a form acceptable to the Commission, and generally in conformance with the provisions of Tariff Circular No. 2 and General Order No. 80 governing the construction and filing of common carrier tariffs. Radial highway common carriers, highway contract carriers and household goods carriers deviating from the minimum rates named in this tariff pursuant to this paragraph shall make reference on their bills of lading to the common carrier rates on file with this Commission which constitute the authority for such deviation.

In the event the armed forces of the United States do not notify this Commission in writing that common carriers are so required to file such rates with this Commission or revoke any such notice previously given, radial highway common carriers, highway contract carriers and household goods carriers may deviate without limitation from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

[fol. 94] Decision No. 51832 in Case No. 5432 California Public Utilities Commission:

"Decision No. 51832

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5432

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).

SUPPLEMENTAL OPINION AND ORDER

Decision No. 51831, in this proceeding, issued today, pointed out that amendment of Section 530 of the Public Utilities Code, effective September 7, 1955, changes the conditions under which common carriers may transport property for the United States, state, county or municipal governments. That decision further found that, in view of this statutory change, the rule in Item 20 of Minimum Rate Tariff No. 2, allowing highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the armed forces of the United States, should be canceled.

Therefore, good cause appearing,

It Is Hereby Ordered that Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606 as amended) be and it is hereby further amended by incorporating therein, to become effective September 7, 1955, First Revised Page 12-A cancels Original Page 12-A, which revised page is attached hereto and by this reference made a part hereof.

In all other respects said Decision No. 31606, as amended, [fol. 95] shall remain in full force and effect.

This order shall become effective September 7, 1955.

Dated at San Francisco, California, this 16th day of August, 1955.

Peter E. Mitchell, President.

Justus F. Craemer, Ray E. Untereiner, Matthew J. Dooley, Rex Hardy, Commissioners.

Certified as a True Copy

.....

Asst. Secretary, Public Utilities Commission
State of California

[fol. 96] First Revised Page ... 12-A
Cancels
Original Page 12-A

MINIMUM RATE TARIFF No. 2

Item	SECTION No. 1—RULES AND REGULATIONS OF GENERAL APPLICATION (Continued)
No.	APPLICATION OF TARIFF—CARRIERS

Rates provided in this tariff are minimum rates established pursuant to the Highway Carriers' Act and the Household Goods Carriers Act and apply for transportation of property by radial highway common carriers, highway contract carriers and household goods carriers as defined in said Acts.

When property in continuous through movement is transported by two or more such carriers, the rates (including minimum charges) provided herein shall be the minimum rates for the combined transportation.

*20-D
Cancels
20-C

***

Rates, rules and regulations named in this tariff shall not apply to transportation by independent-contractor sub-haulers when such transportation is performed for other carriers. This exception shall not be construed to exempt from the tariff provisions carriers for whom the independent contractors are performing transportation service.

*Change)
***Paragraph canceled) Decision No. 51832

EFFECTIVE SEPTEMBER 7, 1955

Issued by the Public Utilities Commission of the State of California, San Francisco, California.

Correction No. 673

[fol. 97] Decision No. 51922 in Case No. 5432 California Public Utilities Commission:

"Decision No. 51922

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5432, Petition for Modification No. 34 (Rehearing)

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).

APPEARANCES

Edward M. Berol, Lewis Clark, and *Arlo D. Poe,* for California Government Traffic Conference, petitioner.

Arlo D. Poe and *J. C. Kaspar,* for California Trucking Association, Inc. (formerly Motor Truck Association of California); *L. E. Osborne,* for California Manufacturers' Association; *T. A. L. Loretz,* Tariff Agent; *J. L. Beeler,* for Southwestern Motor Tariff Bureau; *Maurice A. Owens,* for Draymen's Association of Alameda County, Pacific Motor Tariff Bureau; *H. L. Mathewson,* for Pacific States Motor Tariff Bureau, Tank Truck Operators Tariff Bureau, and Elmer Ahl, Tariff Publishing Agent; *A. F. Schumacher* and P. N. Kujachich, for Owens-Illinois Glass Co., Pacific Coast Division; *Jess E. Francis,* for Continental Freight Lines; *C. R. Nicherson,* for Pacific Coast Tariff Bureau and T. A. L. Loretz, Tariff Agent; *Harry Marioneaux, Marquam C. George* and *Walter Alves,* for Alves Service Transportation; *Harry Marioneaux* and *Walter Alves,* for All-State Transportation Company; *Harry Marioneaux,* for J. A. Nevis Trucking, Inc.; *Graeme Pexton,* for Constructors Transport Co., Inc.; *Harold F. Culy,* for Culy Transportation Co., Inc.; *E. J. Muzio,* for Miles & Sons Trucking Service and Miles Motor Transport System; *John W. Smith,*

for Southern Pacific Company and Pacific Motor Trucking Company; *James E. Doyle*, for Doyle Draying Co.; W. J. Pope, for Aetna Freight Lines; *Peter Vinick*, for Lodi Truck Service; *S. A. Moore*, for Permanente Cement Co.; and *Leslie C. George*, for Leslie C. George, Refrigerated Trucking, interested parties.

Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the U. S. Government; and *Earl S. Williams*, for the Department of Finance of the State of California.

J. A. McCunniff and John W. Mallory, for the Commission's staff.

[fol. 98] OPINION AND ORDER

On May 3, 1955, the Commission issued its order granting rehearing with respect to Decision No. 51047, issued January 25, 1955, herein. On August 16, 1955, and prior to the rehearing the Commission on its own motion issued Decisions Nos. 51831, 51832, and 51833 by reason of amendments to Section 530 of the Public Utilities Code to become effective September 7, 1955. Decision No. 51832 which cancelled the rule in Item 20 of Minimum Rate Tariff No. 2, allowing highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States, is within the scope of this proceeding.

Public hearings were held before Examiner Cline at San Francisco on August 25, 1955. The matter was taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of Decision No. 51832 and a written request on behalf of Alves Service Transportation to extend the effective date of Decisions Nos. 51831 and 51832. On August 26, 1955, the Department of Defense filed a petition herein to postpone the effective date of Decision No. 51832, and Alves Service Transportation filed a petition for rehearing and extending of effective date of Decisions Nos. 51831 and 51832.

At the hearing the representative for the petitioner, California Government Traffic Conference, stated that nothing further would be offered as Decision No. 51832 satisfactorily handled the matter with which the California Government Traffic Conference had been concerned.

The representative for the Department of Defense stated that in his opinion the minimum rates established in Minimum Rate Tariff No. 2 are not appropriate for the movement of traffic for the Armed Forces of the United States, and unless satisfactory rates for such traffic could be established on an interim basis before September 7, 1955, the effective date of Decision No. 51832 should be extended. [fol. 99] The presiding examiner properly ruled that requests for authorization to establish reduced rates for the United States pursuant to Section 530 of the Public Utilities Code, as amended, would be outside the scope of this proceeding and should be the subject of separate petitions. The Department of Defense has requested the Commission to postpone the effective date of Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publications of permitted carriers setting forth the actual rates to be charged the Government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the Government traffic pattern, which are acceptable to this Commission.

The petition of Alves Service Transportation requests that the effective date of Decision No. 51832 be extended for a period of 90 days.

No one opposed the requests for extension of the effective date of Decision No. 51832. However, the representatives for petitioner and the California Manufacturers' Association urged that the Commission grant any request for extension of the effective date of Decision No. 51832 only after careful and thorough consideration.

As grounds for the extension of the effective date the Department of Defense in its petition stated:

1. The Department of Defense is one of California's largest shippers.

2. In many instances military installations are outside the immediate boundaries of the commercial zones

of large industrial centers. Rates available to commercial shippers in such commercial zones are not available in many instances for the movement of military traffic emanating from and destined to military installations.

3. If Decision No. 51832 is permitted to go into effect as scheduled on September 7, 1955; it will have a tremendous impact on the movement and distribution of traffic for the Armed Forces and will create chaotic conditions in the movement of such traffic.

4. Military traffic is not a burden on commercial traffic.

[fol. 100] 5. The Department of Defense favors reasonable rates on a stabilized basis. Class rates are not proper under all circumstances for the movement of military traffic. Military traffic often moves in sufficiently large quantities to entitle it to commodity rates.

6. Rate quotations of carriers for the account of the Armed Forces should be filed with this Commission.

7. The military department should have available to it flexible rate adjustment machinery.

8. In order that military traffic can continue to move by permitted carriers, it is essential that rates of permitted carriers continue to be in written form and to be filed with the Governmental Agencies.

9. The Department of Defense is conducting negotiations with California tariff agencies to modify rate tenders in such a manner as to make them acceptable to the Department of Defense and it is believed that differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated, the Government is opposed to Decision No. 51832 becoming effective.

10. If Decision No. 51832 becomes effective September 7, 1955, after said date and until acceptable permitted carrier tenders are formulated and, where nec-

essary, approved by this Commission, military traffic of necessity will have to be transported by common carriers regardless of the adequacy or inadequacy of their services and the reasonableness of their traffic rates.

At the hearing the representative for the Department of Defense stated that in the opinion of the Department of Defense reparations might be recovered from common carriers for certain military shipments handled at minimum rates or higher, whereas no such reparations could be recovered in similar circumstances from permitted carriers.

After careful consideration of the record the Commission is of the opinion and finds that the effective date of the elimination from Minimum Rate Tariff No. 2 of the rule in Item 20 permitting transportation for the Armed Forces at free or reduced rates should be extended to December 5, 1955, in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their law-
[fol. 101] ful rates pursuant to Section 530 of the Public Utilities Code, as amended. The petition for rehearing of Decisions Nos. 51831 and 51832 and for extending the effective date of Decision No. 51831 filed by Alves Service Transportation will be the subject of a separate order of this Commission.

Therefore, good cause appearing, it is hereby ordered that:

1. Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606, as amended) be and it is hereby further amended by incorporating therein, to become effective September 6, 1955, except as otherwise provided, Second Revised Page 12-A cancels First Revised Page 12-A and Original Page 12-A, which Second Revised Page 12-A is attached hereto and by this reference made a part hereof.

2. The third paragraph of Item 20 E of Minimum Rate Tariff No. 2 appearing on said Second Revised Page

12-A be and it is hereby cancelled effective December 5, 1955, as shown thereon.

3. In all other respects said Decision No. 31606, as amended, shall remain in full force and effect.

4. Except to the extent herein granted, petition for modification No. 34 to Case No. 5432 is hereby denied.

Paragraphs numbered 1 and 3 of this order shall become effective September 6, 1955, and paragraphs numbered 2 and 4 of this order shall become effective September 26, 1955.

Dated at San Francisco, California, this 6th day of September, 1955.

Peter E. Mitchell, President.
Justus F. Craemer, Rex Hardy, Commissioners.

Commissioners Ray E. Untereiner, Matthew J. Dooley, being necessarily absent, did not participate in the disposition of this proceeding.

Certified as a True Copy

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

[fol. 102] Second Revised Page 12-A
Cancels
First Revised Page 12-A
And
Original Page 12-A

MINIMUM RATE TARIFF No. 2

Item	SECTION No. 1—RULES AND REGULATIONS OF GENERAL APPLICATION (Continued)
No.	APPLICATION OF TARIFF—CARRIERS

Rates provided in this tariff are minimum rates established pursuant to the Highway Carriers' Act and the Household Goods Carrier Act and apply for

transportation of property by radial highway common carriers, highway contract carriers and household goods carriers as defined in said Acts.

When property in continuous through movement is transported by two or more such carriers, the rates (including minimum charges) provided herein shall be the minimum rates for the combined transportation.

"20-E Cancels 20-D and 20-C

(1) Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States.

Rates, rules and regulations named in this tariff shall not apply to transportation by independent-contractor sub-haulers when such transportation is performed for other carriers. This exception shall not be construed to exempt from the tariff provisions carriers for whom the independent contractors are performing transportation service.

*(1) The provisions of this paragraph are canceled effective December 5, 1955.

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* Change, Decision No. 51922

EFFECTIVE SEPTEMBER 6, 1955
(Except as otherwise provided.)

Issued by the Public Utilities Commission of the State of California, San Francisco, California.

Correction No. 674 "

[fol. 103] Decision No. 52287 in Case No. 5432—California Public Utilities Commission:

"Decision No. 52287

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5432 (Petition No. 34) (First Supplemental)

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers, relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).

SUPPLEMENTAL OPINION AND ORDER

By Decision No. 51832 of August 16, 1955, following amendments to Section 530 of the Public Utilities Code, the rule in Item No. 20 of Minimum Rate Tariff No. 2, which allowed highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States, was canceled. Following representations of the Department of Defense and other interested parties, the effective date of the cancellation of the tariff rule was postponed to December 5, 1955, in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended (Decision No. 51922, dated September 6, 1955, in this proceeding).

By petition filed November 21, 1955, the Department of Defense seeks a further 60-day postponement. The petitioner avers that it has attempted diligently and in good faith to meet the December 5 date, but that because of the magnitude of the task it is unable to do so.

By the amendment to Section 530 of the Public Utilities

effective September 7, 1955, the general right of common [fol. 194] carriers to transport property for government agencies at free or reduced rates was removed, subject to such exceptions as the Commission may consider just and reasonable. The provision of Item No. 20 of Minimum Rate Tariff No. 2 which permits carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States constitutes an exception which was established prior to the amendment of Section 530. So long as this provision remains in effect, not only the permitted carriers but also the common carriers are without the rate regulation which clearly was contemplated under the recent legislative enactment. (See Decision No. 51831 dated August 16, 1955, in case No. 5432.) As hereinbefore stated, the Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed to the Commission for its consideration.

The intent of the legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable.

Therefore, good cause appearing,

It Is Hereby Ordered that First Supplemental Petition for Modification No. 34, in Case No. 5432, filed November 21, 1955, by the Department of Defense, be and it is hereby denied.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of November, 1955.

Peter E. Mitchell, President, Justus F. Craemer, Ray E. Untereiner, Matthew J. Dooley, Commissioners.

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 105] Decision No. 52317 in Case No. 5432, California Public Utilities Commission:

"Decision No. 52317

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5432 (Petition No. 34) (First Supplemental)

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers, relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).

SUPPLEMENTAL OPINION AND ORDER

The United States District Court for the Northern District of California, Southern Division, having issued a restraining order in the case of *United States of America, Plaintiff*, vs. *Public Utilities Commission of the State of California*, Defendant, Civil Action No. 35101, restraining the defendant Public Utilities Commission of the State of California "from taking any action or issuing any order which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for transportation of government property," and good cause appearing,

It Is Hereby Ordered that:

1. Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606, as amended) be and it is hereby further amended by incorporating therein, to become effective December 5, 1955, Supplement No. 29 which is attached hereto and by this reference made a part hereof.

2. The cancellation of the third paragraph of Item 20E of Minimum Rate Tariff No. 2 is hereby suspended until final disposition of the case of *United States of America, Plaintiff*, v. *Public Utilities Commission of*

the State of California, Defendant, Civil Action No. 35101, now pending in the United States District Court for the Northern District of California, Southern Division, and until the further order of the Commission.

[fol. 106] This order shall become effective on the date hereof.

Dated at San Francisco, California, this 5th day of December, 1955.

Peter E. Mitchell, President, Justus F. Craemer, Ray E. Untereiner, Matthew J. Dooley, Rex Harry, Commissioners.

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

[fol. 107] SUSPENSION SUPPLEMENT

SUPPLEMENT NO. 29
(Supplements Nos. 28 and 29 contain all changes)
TO
MINIMUM RATE TARIFF NO. 2
NAMING
MINIMUM RATES, RULES AND
REGULATIONS
FOR THE
TRANSPORTATION OF
PROPERTY OVER THE PUBLIC
HIGHWAYS WITHIN THE
STATE OF CALIFORNIA
BY
RADIAL HIGHWAY COMMON CARRIERS
HIGHWAY CONTRACT CARRIERS
AND
HOUSEHOLD GOODS CARRIERS

SUSPENSION NOTICE
(Armed Forces Traffic)

By Decision No. 52317, dated December 5, 1955, the cancellation of the third paragraph of Item No. 20-E, as shown on Second Revised Page 12-A, is hereby suspended until further order of the Commission.

ISSUED DECEMBER 5, 1955

Issued by
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
State Building, Civic Center
San Francisco, California

[fol. 108] Petition of Department of Defense to postpone effective date of Commission Decision No. 51832 in Case No. 5432.

"BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Filed Public Utilities Commission, State of California, August 26, 1955, San Francisco Office, Case No. 5432

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).

[fol. 109] BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Case No. 5432

Petition of the Department of the Navy on behalf of the Department of Defense to postpone the effective date of the Commission's Decision No. 51832.

Comes now the Secretary of the Navy, C. S. Thomas, through his duly authorized representative, on behalf of the Department of Defense, and hereby petitions the Public

Utilities Commission of the State of California to postpone the effective date of the said Commission's Decision No. 51832 for a period of 90 days or until such time as: (a) acceptable rate publications of permitted carriers setting forth the actual rates to be charged the Government can be formulated, and (b) reasonable and acceptable common carrier tenders can be negotiated to fit the Government traffic pattern, which are acceptable to your Commission.

In support of this petition the Department of Defense shows:

1. That this department has a substantial, material and financial interest in the rates to be charged on its California intrastate traffic. It is one of California's largest shippers. During 1954 Department of Defense traffic moving between points in California amounted to 4,242,682,400 pounds or an average of 353,556,866 pounds per month, of which about 20 percent was dry cargo consisting of every conceivable commodity.

2. That, in many instances, the location of military installations is necessarily outside the immediate boundaries of the commercial zones of large industrial centers, which is an influential factor in the establishment of rates. Consequently, rates available to commercial shippers from such industrial locations are not available in many instances for the movement of military traffic emanating from and [fol. 110] destined to such military installations.

3. That under the conditions existing at the time of the prior hearings in Case No. 5432, Petition No. 34, common carriers under Section 530 of the Public Utilities Act and permitted carriers under your Commission's Decision No. 42031 were free to adjust rates speedily and economically. Since that time there has been enacted into law California Assembly Bill 2480, and your Commission's Decision 51831 has been issued pursuant to the new statute. In addition, your Commission has also issued Decision 51832 cancelling the provision authorizing permitted carriers to grant reduced rates. The exact effect of the law and these decisions on military traffic is not definitely known, but it is known that this chain of events will have a tremendous impact on the movement and distribution of this traffic and will create

chaotic conditions in the movement of such traffic if Decision No. 51832 is permitted to go into effect as scheduled on September 7, 1955.

4. That military traffic is not a burden on commercial traffic. Exact statistics on California intrastate traffic for both commercial and military shippers are not available, however, the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission in its Monthly Comment issue of August 1955, in speaking of the relationship of Section 22 (special rate) quotations and similar rates charged for traffic of private concerns on the same commodities and for similar lengths of hauls, stated average estimates indicate "that Section 22 quotations averaged about 14 percent above comparable commodity rates for the year 1950 and about 22 percent above the comparable rates for the year 1952."

5. That the Department of Defense favors reasonable rates on a stabilized basis. It seeks rate adjustments only after a thorough analysis of rate-making factors surround- [fol. 111] ing the particular transactions involved and after the determination that the existing rates are excessive, based on sound rate-making principles and the circumstances of the instant case. Class rates, however, are not proper under all circumstances for the movement of military traffic, which often moves in sufficiently large volume to entitle it to commodity rates if offered by a commercial shipper.

6. That the Department of Defense believes rate quotations of carriers for account of the Armed Forces should be filed with your Commission, and thereby throw the light of day on the level of the circumstances surrounding the establishment of such rates and charges.

7. That in the Armed Forces supply demand often follows so closely behind procurement that no time is available for normal rate proceedings and tariff publications, and that time is of the essence in the movement of military traffic, particularly in times of emergency. These factors make it necessary for the military departments to have available flexible rate adjustment machinery, otherwise such

departments will have to seek adjustments on a large variety of its commodities through slower tariff procedures, and formal proceedings, and, in instances reparations, with the resultant increase in costly and time-consuming litigation before regulatory bodies.

8. That a preponderance of military dry cargo is transported by permitted carriers. To permit military traffic officers to predetermine rates and charges it is necessary that such rates and charges be contained in formal publications issued by such permitted carriers and filed with military routing agencies. Such agencies are in many instances so far removed from points of shipment that it is impossible for military establishments to enter into individual contracts for each individual shipment. Thus, in order that military traffic can continue to move by permitted carriers, it is essential that rates of permitted carriers continue to be [fol. 112] in written form and to be filed with the Governmental agencies as heretofore.

9. That certain present rate tenders which have been effective for both permitted and common carriers contain rules and other provisions which are non-acceptable to the military establishment, which establishment is presently conducting negotiations with California tariff agencies to modify these rate tenders in such a manner to make them mutually acceptable. There is very little difference in the views of some of these agencies with those of this department, and it is believed that such differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated, however, the Government is opposed to Decision No. 51832 becoming effective.

10. That if said order becomes effective as scheduled, after September 7, military traffic of necessity will have to be transported by common carriers regardless of the adequacy or inadequacy of their services and the reasonableness or unreasonableness of their traffic rates until acceptable permitted carriers' tenders are formulated and approved, if they deviate from the Public Utilities Commission rates.

Wherefore, the Department of Defense respectfully urges that your Commission postpone the effective date of

Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publications of permitted carriers setting forth the actual rates to be charged the Government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the Government traffic pattern, which are acceptable to your Commission.

Respectfully submitted,

C. S. Thomas, Secretary of the Navy, /s/ Clement T. Mayo, Commerce Counsel, By direction.

[fol. 113] CERTIFICATE OF SERVICE

I, Clement T. Mayo, her-by certify that I have, this 26th day of August, 1955, served a copy of the foregoing Petition for Postponement of the effective date of Decision No. 51832, in Case No. 5432, to the following parties, by mailing a copy thereof by first-class mail, postage prepaid:

Edward Berol, 100 Bush Street, San Francisco, California.

J. C. Kaspar, Motor Truck Association of California, 3301 S. Grand Avenue, Los Angeles 7, California.

Leslie C. George, California Manufacturers' Association, 1501 Bancroft Avenue, San Francisco 24, California.

Arlo D. Poe, Motor Truck Association of California, 639 South Spring Street, Los Angeles 14, California.

T. A. L. Loretz, Agent, Room 205—108 West Sixth Street, Los Angeles 14, California.

J. L. Beeler, Agent, Southwestern Motor Tariff Bureau, 610 South Main Street, Los Angeles 14, California.

Maurice A. Owens, Draymens Association of Alameda County, 106—15th Street, Oakland, California.

H. L. Mathewson, Pacific States Motor Tariff Bureau, 577 Howard Street, San Francisco, California.

A. F. Schumacher and P. N. Kujachich, Owens-Illinois Glass Company, 530 Sansome Street, San Francisco, California.

J. E. Francis, Continental Freight Lines, 2705 South Alameda Street, Los Angeles, California.

[fol. 114] C. R. Nickerson, Agent, Pacific Coast Tariff Bureau, 461 Market Street, San Francisco, California.

Harry Marioneaux, Alves Service Transportation Company, All-State Transportation Company, J. A. Nevis Trucking Company, 4107 Creed Avenue, Los Angeles 8, California.

Graeme Pexton, Constructors Transport Company, 1205 Date Street, Montebello, California.

Harold F. Culy, Culy Transportation Company, 600 High Street, Oakland, California.

E. J. Muzio, Miles Motor Transport, 804 South Aurora Street, Stockton, California.

John W. Smith, Southern Pacific Company, Pacific Motor Trucking Company, 65 Market Street, San Francisco, California.

James E. Doyle, Doyle Draying Company, 1970 East Street, Concord, California.

W. J. Pope, Aetna Freight Lines, 218 West Ann Street, Los Angeles 8, California.

Peter Vinich, Lodi Truck Service, South Cherokee Lane, Lodi, California.

Walter Alves, Alves Service Transportation, 1947 Davis Street, San Leandro, California.

[fol. 115] John M. Ross, Constructors Transport Company, 1401 Middle Harbor Road, Oakland, California.

Leslie C. George and L. Scott Litcher, Refrigerated Trucking Company, 1501 Bancroft Avenue, San Francisco 24, California.

Earl Williams, State of California, Department of Finance, 1021 "O" Street, Sacramento, California.

S. A. Moore, Permanente Cement Company, 1924 Broadway, Oakland 12, California.

Marquam C. George, Alves Service Transportation, 5653 College Avenue, Oakland, California.

John W. Mallory, of the Commission's Staff.

J. A. McCunniff, of the Commission's Staff.

/s/ Clement T. Mayo, Commerce Counsel."

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 116] Petition of Department of Defense to postpone effective date of Commission Decision No. 51922 in Case No. 5432:

"Before the Public Utilities Commission of the State of California

Filed Public Utilities Commission, State of California November 21, 1955, San Francisco Office, Case No. 5432 (Petition No. 34)

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers, relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).

First Supplemental Petition to Petition for Modification No. 34

Petition of the Department of the Navy for and on behalf of the Department of Defense, under Rule 35 of the Rules of Procedure of the Public Utilities Commission of the State of California to postpone for an additional period of sixty (60) days beyond December 4, 1955, the effective date of the elimination from Minimum Rate Tariff No. 2 of the provision in Item 20 series which permits transportation for the Armed Forces at free or reduced rates, to December 5, 1955, presently under postponement by Decision No. 51922.

To the Honorable, the Public Utilities Commission of the State of California, San Francisco, California.

Comes now the Secretary of the Navy, C. S. Thomas, through his duly authorized representative, on behalf of the Department of Defense and hereby petitions the Public Utilities Commission of the State of California, under Rule 35 of the Rules of Procedure of the Public Utilities Commission of the State of California, to postpone for an additional period of sixty (60) days beyond December 4, 1955, the effective date of the elimination from Minimum Rate

Tariff No. 2 of the provision in Item 20 series, which permits transportation for the armed forces at free or reduced rates to December 5, 1955, presently under postponement by Decision No. 51922.

Petitioner, for supporting reasons hereinafter stated, requests the aforementioned postponement to permit petitioner reasonable opportunity to present to carriers levels of rates which petitioner believes are just and reasonable under the circumstances and thus give the carriers and their tariff publishing agents reasonable opportunity to negotiate [fol. 117] rate tenders mutually satisfactory to themselves and to petitioner, and in those few instances where necessary, to permit carriers to seek authority from your Commission to establish such rate tenders as their lawful rates.

Petitioner avers, in support of the aforementioned request for postponement, that it has diligently and in good faith attempted to meet the December 5, 1955 date authorized by your Commission, but that because of the magnitude of the task confronting petitioner, it is unable to meet said date.

Petitioner further avers that to arrive at levels of rates which it feels would be just and reasonable, petitioner has had to assemble and sift facts from voluminous records of the three military departments with respect to locations of installations, volume and repetition of commodities moving, levels of present rates, revenue contribution of present and proposed rates, and a multitude of other matters, all of which has been time consuming.

Petitioner states that this basic work is now completed and final levels of rates, with appropriate back-up data, are almost ready for presentation to the carriers and their agents for consideration and such negotiation as may be necessary to finalize the level of rates to be filed with your Commission.

Petitioner further states, in this connection, that on October 28, 1955, a letter was transmitted to agent Beeler, a copy of which is attached as Appendix A, stating that when this work is completed, final levels of rates with appropriate back-up data will be furnished the carriers and their agents for study, comment, and joint discussion. Similar letters were written to agents Marioneaux, Loretz, Ahl, and Nickerson, and Mr. J. E. Francis of the Continental Freight Lines.

Petitioner, in conclusion, and in further justification of the aforementioned postponement, invites the attention of [fol. 118] your Commission to the fact that procurement by the Department of Defense of transportation services from commercial carriers is markedly different from procurement by private shippers, in that procurement by the Department of Defense must necessarily be geared to the ever-changing pattern of defense and that the recent amendment to Section 530 of the Public Utilities Code has necessitated various changes in the methods of procurement to adapt them to the military operation.

Wherefore, petitioner respectfully requests that your Commission postpone for an additional period of sixty (60) days beyond December 4, 1955, the effective date of the elimination from Minimum Rate Tariff No. 2 of the provision in Item 20 series which permits transportation for the armed forces at free or reduced rates to December 5, 1955, presently under postponement by Decision No. 51922.

Respectfully submitted,

R. J. Arnold, Rear Admiral, SC, USN, Chief, Bureau of Supplies and Accounts for The Secretary of the Navy, By /s/ F. L. Haerlin, Captain, SC, USN, Assistant Chief for Transportation, Bureau of Supplies and Accounts

/s/ Clement T. Mayo, of Counsel.

Dated at: Washington 25, D. C., 16 November 1955.

[fol. 119] CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon all parties of record in this proceeding, by mailing by first-class mail a copy thereof properly addressed to each party.

Dated at Washington, D. C., this 16th day of November 1955.

/s/ Clement T. Mayo

[fol. 120] APPENDIX A

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
Washington 25, D. C.

October 28, 1955

Supply and Logistics
TR

Dear Mr. Beeler:

At the present time we are in the process of completing an analysis of recently compiled Department of Defense California intrastate freight statistics. It is our intention, predicated on the conclusions reached from the foregoing analysis, to propose specific point-to-point or area commodity rates which we believe reasonable for future application in California. Because of the immensity of the task we are not able at this time to provide you with specific proposals. However, when our work has been completed we intend to place copies of our studies and conclusions in the hands of the California carriers and/or their agents for study, comment and possibly joint discussion.

It is not clear to us what the position of the various carriers and agents will be in this matter and for this reason we would appreciate advice from you as to whether it is your intention, on behalf of the carriers you represent, to affirmatively petition the California Public Utilities Commission for authority to establish future rates pursuant to the Commission's Decision No. 51831, Case No. 5432, dated August 16, 1955. It is also not clear whether it is your intention to predicate future proposals to the Commission solely on the basis of acceptable Department of Defense studies or whether you are independently constructing what you believe to be reasonable rates for the future.

As pointed out above the Department of Defense studies in this matter are quite voluminous and it is questionable whether they will be completed by December 5th, the postponed date of the effectiveness of Decision No. 51831. Accordingly, it might be necessary to seek a further postponement of the effectiveness of the above order. Please advise whether we may anticipate your support in the event a postponement of sixty days is sought.

We would appreciate an early reply to the above and at the same time would appreciate information as to whether it is your intention to participate in any future hearings before the California Public Utilities Commission independently appearing on behalf of your carriers or whether appearances for your carriers will be made by the California Trucking Associations.

Sincerely yours,

/s/ Earl B. Smith, Director of Transportation and Communications.

Mr. J. L. Beeler, 610 S. Main Street, Los Angeles 14, California.

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

[fol. 121] Notice of Hearing dated August 10, 1955

"Public Utilities Commission
State of California

State Building, San Francisco 2, California, August 10, 1955, Case No. 5432 (Pet. No. 34)

To Interested Parties:

Rehearing with respect to Decision No. 51047 of January 25, 1955, in Case No. 5432 (Petition No. 34) has been scheduled for *Thursday, August 25, 1955,* at 10:00 a. m., in the Commission's Courtroom, *San Francisco,* before Examiner Wilson E. Cline. The decision related to the petition of California Government Traffic Conference seeking modification of Item No. 20 of Minimum Rate Tariff No. 2 in connection with the transportation of property for the armed forces of the United States.

Yours very truly,

PUBLIC UTILITIES COMMISSION, STATE OF CALIFORNIA

By R. J. Pajalich, Secretary"

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 122] AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.*

Chauncey L. Griggs, being first duly sworn, deposes and says:

That he is a citizen of the United States over the age of 18 years, a resident of the City and County of San Francisco, State of California, and not a party to nor interested in the proceeding entitled United States of America vs. Public Utilities Commission of the State of California, Civil Action No. 35101, in the United States District Court for the Northern District of California, Southern Division; that on August 10, 1955, he deposited in the United States mail copies of the foregoing notice dated August 10, 1955, of rehearing with respect to Decision No. 51047, addressed to all appearances in Case No. 5432 (Petition No. 34), including "Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts Department of the Navy, Washington 25, D.C."

That said copies were enclosed in sealed envelopes and all postage thereon prepaid; that the attorney above named had his offices in the city designated; and that there is regular daily communication by mail between said City and County of San Francisco, State of California, and the city above designated.

/s/ Chauncey L. Griggs

Subscribed and sworn to before me this 25th day of January, 1956. William I. Sullivan, Clerk, Supreme Court of the State of California. By Di Noia, Deputy Clerk. [SEAL]

[fol. 123] Petition of California Government Traffic Conference in Case No. 5432, Petition for Modification No. 34, dated June 2, 1954.

"BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Filed Public Utilities Commission, State of California, Jun 3, 1954, San Francisco Office, Case No. 5432, Petition for Modification No. 34.

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).

PETITION OF CALIFORNIA GOVERNMENT TRAFFIC CONFERENCE FOR AN ORDER MODIFYING THE MINIMUM RATES, RULES AND REGULATIONS HERETOFORE PRESCRIBED

The petition of the California Government Traffic Conference respectfully shows:

I.

That your petitioner is an unincorporated association. Included in its membership are all classes of highway carriers engaged in the transportation of property for the armed forces of the United States.

II.

That your petitioner's address is:

California Government Traffic Conference, 3301 South Grand Avenue, Los Angeles 7, California.

III.

That all notices, correspondence, and communications with respect to this petition should be addressed to Edward M. Berol, 1095 Market Street, San Francisco 3, California, the attorney for the petition.

IV.

That heretofore your Commission prescribed just, reasonable, and nondiscriminatory rates and charges to be assessed, charged and collected, and the rules and regulations to be observed by radial highway common carriers, highway contract carriers, and household goods carriers. That such minimum rates, rules and regulations are contained in [fol. 124] Highway Carriers' Tariff No. 2.

V.

That your petitioner proposes, pursuant to Section 3662 of the Public Utilities Code, to modify Item No. 20-C of Highway Carriers' Tariff No. 2, by eliminating from said item the paragraph reading as follows:

> "Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

As justification, your petitioner alleges that said paragraph was incorporated in Item 20 Series of Highway Carriers' Tariff No. 2 by Decision No. 42031, dated September 14, 1948, in Case No. 4808. In said Decision your Commission stated:

> "From the evidence of record it is apparent that radial highway common, highway contract and city carriers are disadvantaged by the statutory privileges accorded only to common carriers in the transportation of government traffic. An equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments should be accorded all classes of carriers. * * * "
>
> (48 P.U.C. 237, 239)

Certain permit carriers have taken liberal and literal advantage of the " * * * equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments * * * ". In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon [fol. 125] other traffic. That the public interest and the preservation of a sound minimum rate structure requires that such practices be stopped and that the privilege accorded by Decision No. 43021 be discontinued.

VI.

That your petitioner requests that this petition be set for hearing and that your petitioner and such other parties as may be interested be permitted to offer such evidence as may be pertinent.

Wherefore, your petitioner prays that this petition be set for hearing and that your Commission make such order as may be meet and proper in the premises.

Dated, June 2, 1954.

California Government Traffic Conference, By W. J. Lawson, Chairman.

Edward M. Berol, 1095 Market Street, San Francisco 3, California, Attorney for Petitioner.

[fol. 126] STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO, *ss.*

William J. Lawson, being first duly sworn, deposes and says:

That he is the Chairman of the California Government Freight Traffic Conference, the petitioner herein; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

William J. Lawson

Subscribed and sworn to before me this 2nd day of June, 1954. JSH, NP. Gertrude S. Hayward, Notary Public in and for the City and County of San Francisco, State of California. [Seal]

[fol. 127] CERTIFICATE OF SERVICE

I, Edward M. Berol, hereby certify that I have, this 2nd day of June, 1954, mailed a copy of the foregoing Petition of the California Government Traffic Conference to the following parties, by mailing a copy thereof by first-class mail, postage prepaid:

The Truck Owners Association of California, 417 Market Street, San Francisco, California.

The California Motor Truck Association, 3301 South Grand Avenue, Los Angeles, California.

Southern Pacific Company, 65 Market Street, San Francisco, California.

Atchison, Topeka & Santa Fe Railway Company, 114 Sansome Street, San Francisco, California.

Western Pacific Railroad, 526 Mission Street, San Francisco, California.

Edward M. Berol"

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 128] Notice of Hearing dated September 10, 1954.

"PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

State Building, San Francisco 2, California, September 10, 1954, Case No. 5432 (Pet. No. 34).

To Interested Parties:

On September 2, 1954, a prehearing conference was held in the above proceeding in the Commission's Courtroom, State Building, San Francisco, at which the parties listed below were present. At this conference it was agreed that the matter should be set for hearing in San Francisco on November 3, 1954, and that November 4 and 5, 1954, would be reserved for further hearing, if necessary.

Edward Berol, Attorney for petitioner, stated that he would furnish Mr. C. T. Mayo of the Navy Department with a schedule for each of the 32 members of the California Government Traffic Conference showing the types of permits held, the permit numbers of each permit, the geographical area served and the types of commodities hauled under each permit. The common carrier operating authorit of each of the 32 members of the California Government Traffic Conference may be ascertained from the files of this Commission.

The exhibits of petitioner are to be distributed at least 25 days prior to hearing, those of the governmental agencies at least 15 days prior to hearing, and those of other interest parties at least 10 days prior to hearing. The numbers in parentheses preceding the names listed below indicate the number of copies of exhibits required by each party.

Notice is hereby given that an adjourned public hearing in Case No. 5432 has been scheduled before Commissioner Craemer and Examiner Cline for Wednesday, November 3, 1954, at 10:00 a.m., Commission's Courtroom, State Building, San Francisco. Thursday and Friday, November 4 and 5, 1954, have also been reserved for further hearing. The purpose of the hearing is to receive evidence relative

to Petition No. 34 of the California Government Traffic Conference seeking modification of Item No. 20 series of Highway Carriers' Tariff No. 2 in connection with the transportation of property for the armed forces of the United States.

Yours very truly,

J. G. Hunter, Director of Transportation.

List of Parties Attending Conference:

(2) Edward Berol, for petitioner, 100 Bush Street, San Francisco, Cal.

(2) John Smith and J. L. McCargar, for Southern Pacific Company, 65 Market Street, San Francisco, California.

(5) C. T. Mayo, for the Armed Forces, Bureau of Supplies and Accounts, Code HA.1, Navy Department, Washington, D.C.

(2) Lewis Clark, for California Government Traffic Conference, 3301 South Grand Avenue, Los Angeles 7, California.

[fol. 129] (2) William Goines, for Bekins Van & Storage Co. and Bekins Van Lines, Inc., 1335 South Figueroa, Los Angeles 15, California.

(2) Marquam C. George, for Alves Service Transportation and All-State Transportation Co., 5653 College Ave., Oakland 18, California.

(3) Harry Marioneaux, for Alves Service Transportation Co., All-State Transportation Co., and J. A. Nevis Trucking, Inc., 4107 Creed Avenue, Los Angeles 8, California.

(2) Walter Alves, for Alves Service Transportation, 1947 Davis Street, San Leandro, California.

(2) Alec McTavish, for J. A. Nevis Trucking, Inc., Box 910 Pittsburg, California.

(1) Arlo D. Poe, for Motor Truck Association of California, 639 South Spring Street, Los Angeles 14, California.

(1) J. C. Kasper, for Motor Truck Association of California, 3301 S. Grand Avenue, Los Angeles 7, California.

(1) J. L. Beeler, for Southwest Motor Traffic Bureau, 610 S. Main Street, Los Angeles 14, California.
(1) W. B. McKinney and G. W. Bengston, Navy Central Freight Control Office, Naval Supply Center, Oakland, California.
(1) P. Vinick, for Lodi Truck Service, P. O. Box 147, Lodi, California.
(1) W. J. Lawson, for Fortier Transportation Co., P. O. Box 431, Fresno, California.
(1) Cliff Northam, for Coast Counties Refrigerated Trucks, 760 Ferry Street, Oakland, California.
(1) Ellsworth Pexton, for Constructors Transport Co., 1205 Date Street, Montebello, California.
(1) John Ross, for Constructors Transport Co., 1401 Middle Harbor Road, Oakland, California.
(1) E. J. Muzio, for Miles Motor Transport, 804 South Aurora Street, Stockton, California.
(2) C. R. Nickerson, for Pacific Coast Tariff Bureau, 461 Market St., San Francisco, California.
(1) Elmer Ahl, for Pacific States Motor Tariff Bureau, P. O. Box 789, Huntington Park, California.
(1) George Dyck, for Culy Transportation Co., 600 High Street, Oakland, California.
(1) J. G. Murphy, for Sacramento Freight Lines, 213-13th Street, Sacramento, California.
(1) Leslie C. George, 1501 Bancroft Avenue, San Francisco 24, Calif.,
(1) R. D. Boynton, for Truck Owners Association, 417 Market Street, San Francisco 5, California.
(1) C. F. Sullivan, for Sullivan Transportation, P. O. Box 277, Brea, Cal.
(1) Commissioner J. F. Craemer, California Public Utilities Commission, State Building, San Francisco 2, California.
(1) Grant Malquist, Supervising Transportation Engineer, Truck Transport Section, California Public Utilities Commission, State Building, San Francisco 2, California.
(2) J. W. Mallory, Associate Transportation Rate Expert, Rate Section, California Public Utilities Commission, State Building, San Francisco 2, California.

(1) Examiner W. E. Cline, California Public Utilities Commission, State Building, San Francisco 2, California.

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 130] Order Granting Rehearing of Decision No. 51047, in Case No. 5432, (Pet. No. 34) dated May 3, 1955.

MM

"Before the Public Utilities Commission of the State of California

Case No. 5432, Petition for Modification, No. 34

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).

Order Granting Rehearing

The applicant, California Government Traffic Conference, having filed a petition for reconsideration, modification, rehearing or for oral argument with respect to Decision No. 51047, issued January 25, 1955, and good cause appearing,

It Is Hereby Ordered that rehearing be and it is hereby granted, such rehearing to be held before such Commissioner or Examiner and at such time and place as may hereafter be designated.

The Secretary is hereby directed to cause a copy of this order to be mailed to each appearance in this proceeding

and to cause notice of said rehearing to be mailed to each such appearance at least ten (10) days before the date of rehearing.

Dated at San Francisco, California, this 3rd day of May, 1955.

Peter E. Mitchell, President, Justus F. Craemer, Ray E. Untereiner, Matthew J. Dooley, Commissioners"

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 131] Amendment to Petition of California Government Traffic Conference in Case No. 5432, Pet. for Modif. No. 34, dated June 16, 1954.

"BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Filed Public Utilities Commission, State of California, Jun 17, 1954, San Francisco Office, Case No. 5432, Petition for Modification, No. 34.

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).

AMENDMENT TO PETITION FOR MODIFICATION NO. 34 OF CALIFORNIA GOVERNMENT TRAFFIC CONFERENCE FOR AN ORDER MODIFYING THE MINIMUM RATES, RULES, AND REGULATIONS HERETOFORE PRESCRIBED

The California Government Traffic Conference respectfully requests that its Petition for Modification No. 34, in

Case No. 5432, filed with your Commission on or about June 4, 1954, be amended as follows:

I.

That Paragraph V of said Petition for Modification No. 34 be deleted in its entirety, and the following substituted in lieu thereof:

"V.

"That your petitioner proposes, pursuant to Section 3662 of the Public Utilities Code, to modify Item No. 20-C of Highway Carriers' Tariff No. 2, as follows:

It is proposed to amend the paragraph of said item reading as follows:

> "Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

so as to read as follows:

> "Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection [fol. 132] with the transportation of property for the armed forces of the United States, *to the extent necessary to meet the rate of a common carrier on file for use with the armed forces of the United States, pursuant to Section 530 of the Public Utilities Code.*"
>
> (Italicized portion constitutes addition.)

As justification, your petitioner alleges that said paragraph was incorporated in Item 20 Series of Highway Carriers' Tariff No. 2 by Decision No. 42031, dated September 14, 1948, in Case No. 4808. In said decision your Commission stated:

> "From the evidence of record it is apparent that radial highway common, highway contract and city carriers are disadvantaged by the statutory privileges accorded only to common carriers in the transportation

> of government traffic. An equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments should be accorded all classes of carriers. * * * "
>
> (48 P.U.C. 237, 239)

Certain permit carriers have taken liberal and literal advantage of the " * * * equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments * * * ." In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic. That it is in the public interest and in the interests of the armed forces of the United States and the preservation of a sound minimum rate structure that such rate-cutting practices, tantamount to a rate war, be discouraged and that permit carriers be required to abide by the minimum rates prescribed by the Public Utilities Commission of the State of California, except to the extent necessary to meet the rate of a common carrier on file [fol. 133] for use with the armed forces of the United States, pursuant to Section 530 of the Public Utilities Code."

Wherefore, your petitioner prays that its Petition for Modification No. 34 be deemed amended in the particulars above set forth.

Dated at San Francisco, California, June 16th, 1954.

California Government Traffic Conference, By Edward M. Berol, Attorney for Petitioner.

Edward M. Berol, 100 Bush Street, Shell Building, San Francisco 4, California, Attorney for Petitioner.

[fol. 134] STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

Edward M. Berol, being first duly sworn, deposes and says:

1. That he is the attorney for California Government Traffic Conference, the petitioner herein;

2. That he has read the foregoing Amendment to Petition for Modification No. 34 and knows the contents thereof; and that the same is true of his own knowledge except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

3. That the reason this verification is made by your affiant is that none of the officers of petitioner are present in the City and County of San Francisco, where affiant maintains his office.

Edward M. Berol

Subscribed and sworn to before me this 16th day of June, 1954. Viola A. Garrison, Notary Public in and for the City and County of San Francisco, State of California. [Seal]

[fol. 135] CERTIFICATE OF SERVICE

I, Edward M. Berol, hereby certify that I have, this 16th day of June, 1954, mailed a copy of the foregoing Amendment to Petition for Modification No. 34, in Case No. 5432, of the California Government Traffic Conference to the following parties, by mailing a copy thereof by first-class mail, postage prepaid:

The Truck Owners Association of California, 417 Market Street, San Francisco, California.

The California Motor Truck Association, 3301 South Grand Avenue, Los Angeles, California.

Southern Pacific Company, 65 Market Street, San Francisco, California.

Atchison, Topeka & Santa Fe Railway Company, 114 Sansome Street, San Francisco, California.

Western Pacific Railroad Company, 526 Mission Street, San Francisco, California.

Lt. Commander J. S. Huntington, Navy Central Freight Control Office, Navy Supply Center, Oakland, California.

Clarence V. Hull, Regional Counsel, General Services Administration, 49 Fourth Street, San Francisco, California.

Transportation Officer, Sixth Army, Presidio, San Francisco, California.

Transportation Officer, United States Air Corps, Patterson Field, Dayton, Ohio.

C. D. Penniman, Colonel T.C., Zone Transportation Officer, 4th Transportation Zone, 1750 Redwood Road, Salt Lake City, Utah.

Mr. Earl B. Smith, Department of Defense, Washington 25, D.C.

Edward M. Berol, Attorney for Petitioner"

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

[fol. 136] Petition of California Government Traffic Conference for Reconsideration in Case No. 5432, Pet. for Modif. No. 34, dated March 11, 1955.

"Before the Public Utilities Commission
of the State of California

Filed Public Utilities Commission, State of California, Mar 11 1955, San Francisco Office, Case No. 5432, Petition for Modification, Petition No. 34.

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).

Petition of the California Government Traffic Conference for Reconsideration or Modification, Rehearing, or, in the Alternative, for Oral Argument En Banc of Decision No. 51047, Dated January 25, 1955

Petitioner, California Government Traffic Conference, respectfully petitions your Commission for reconsideration, modification, rehearing, or, in the alternative, for oral argument en banc, of Decision No. 51047, dated January 25, 1955, and in support of its petition respectfully shows:

Preliminary

Prior to Decision No. 42031, dated September 14, 1948, in Case No. 4808 (48 Cal. P.U.C. 237), permit carriers were required to observe minimum rates in the transportation of government traffic. By that decision permit carriers were relieved of the necessity of so doing.

By petition filed June 3, 1954, as amended June 17, 1954, your petitioner proposed that Item No. 20 Series of Highway Carriers' Tariff No. 2 (now Minimum Rate Tariff No. 2), be amended to read as follows:

> "Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States, *to the extent necessary to meet the rate of a common carrier on file for use with the armed forces of the United States, pursuant to Section 530 of the Public Utilities Code.*" (Italicized portion constitutes addition.)

[fol. 137] As justification for the proposed modification your petitioner alleged:

> "Certain permit carriers have taken liberal and literal advantage of the * * * equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments * * *. In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner

is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic. That the public interest and the preservation of a sound minimum rate structure requires that such practices be stopped and that the privilege accorded by Decision No. 42031 be discontinued."

Hearings were held before Examiner Wilson E. Cline in San Francisco on November 3, 4, and 5, 1954. The Commission issued its Decision No. 51047 on January 25, 1955.

The Commission therein stated:

"The record does not show that the rates of any of the permit carriers for the handling of government shipments are unlawful, *but it does support a finding that certain permit carriers have driven rates for the handling of such shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement of such goods. Such depressed and unreasonably low rates for government traffic are depressing the revenues of the carriers now and previously engaged in handling such traffic and if continued will create a burden upon other traffic.*" (Sheets 3 and 4) (Emphasis supplied)

The Commission found in part, as follows:

"We hereby find that radial highway common carriers, highway contract carriers and household goods carriers should be permitted to deviate from the minimum rates specified in Minimum Rate Tariff No. 2 only to the extent necessary to meet a lower common carrier quotation to the armed forces of the United States *providing said armed forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their*

becoming effective. Otherwise there should be no limitation on the right of such permit carriers to deviate from said minimum rates in connection with transportation of property for the armed forces of the United States. * * * (Sheet 7) (Emphasis supplied)

[fol. 138] The grounds upon which your petitioner considers the decision and order of your Commission to be unlawful, and justification for reconsideration, modification, rehearing, or, in the alternative, for oral argument en banc, are as follows:

I. The opinion and order of your Commission is not supported by the evidence, and is contrary to the evidence.

II. The opinion and order of your Commission deprives your petitioner of property without due process of law, and is in contravention of Amendment 14 to the Constitution of the United States, and of Article 1, Section 13 of the Constitution of the State of California.

III. The opinion and order of your Commission denies to your petitioner the equal protection of the law, and is in contravention of Amendment 14 to the Constitution of the United States, and of Article 1, Sections 11 and 21 of the Constitution of the State of California.

IV. The opinion and order of your Commission is contrary to law and violates Section 3662 of the Public Utilities Code.

V. The opinion and order of your Commission is contrary to sound public policy and the public interest.

ARGUMENT

Representatives of your petitioner have discussed with the armed forces the decision of your Commission and have requested of the armed forces that the armed forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. Your petitioner has been unsuc-

cessful in its endeavors to cause the armed forces to give [fol. 139] such notice to your Commission, and your petitioner has been informed that the armed forces do not feel it is appropriate for them to give such a notice to your Commission and that they will not give such a notice to your Commission. It is to be observed in connection with this issue that the failure of the armed forces to give such notice is not because they do not believe that these chaotic conditions should be corrected, but because they feel it is not within their normal scope of activity to give such a notice to this Commission.

The armed forces appeared at the hearing through Mr. Clement T. Mayo, Commerce Counsel representing the Department of Defense. He stated the position of the Department of Defense to be as follows:

> "Our position as stated in the opening of the proceeding is that we are appearing as our interests may appear. We are not, based on the evidence that has gone in so far, opposed to the petition as it now stands. We certainly will be opposed to the petition as it was originally filed. Our position in these proceedings and the position we have taken through all the proceedings that we have been in in rate matters is that the Department of Defense is in agreement with the National Transportation Policy as declared by the Congress of the United States and is in favor of reasonable rates on a stabilized basis, and of a sound transportation system to meet the needs of commerce in the national defense. Healthy competition is the life of trade and desirable, particularly in the transportation field. But unethical competition can be extremely detrimental to the industry and can seriously hamper the type of transportation service that is imperative to the defense of our nation and for the waging of war. * * * "

(Sheets 5 and 6)

Thus, we find ourselves in the position where the Commission has found that chaotic conditions exist and should be corrected. The instrumentality through which the Commission sought to bring about an end to these conditions has failed. Such failure is not due to the fault of the Commis-

sion, it is not due to the fault of the armed forces, and it is not due to the fault of your petitioner. But while such failure may not be attributable to the Commission, or to the armed forces, or to the petitioner, it nevertheless establishes the impotency of the decision.

[fol. 140] That being the case, it is proper and necessary that we seek a new device to bring about an end to these chaotic conditions. That can be accomplished in either one of two ways:

(1) The Commission may order that radial highway common carriers, highway contract carriers, and household goods carriers deviating from the minimum rates named in Minimum Rate Tariff No. 2 shall make reference on their freight bills to the common carrier rates which constitute the authority for such deviation, or in the event such transportation is performed pursuant to closed bids, the freight bill shall so state. Such procedure will give the Commission all of the safeguards which it needs in policing and enforcing its minimum rate order. The record shows that with minor exceptions, practically all of the common carriers file their government quotations through one or the other of four publishing agents. In the relatively few cases where common carriers file individual quotations the Commission has jurisdiction over such common carriers and is certainly in a position to ascertain as to what their government filing on any particular question may be. This will give permitted carriers a full and free opportunity to deviate from the minimum rates in such cases where competitive rates warrant it and also in such cases where the government calls for closed bids. That is the only justification and marks the limit to which permitted carriers should be permitted to go in deviating from rates found by this Commission to be minimum. Or,

(2) The Commission should require that common carriers be required to file copies of their rate quotations covering transportation of property for the armed forces of the United States in the same manner that is specified in Tariff Circular No. 2 and General Order No. 80.

The Commission's rule making power is broad. Section 701 of the Public Utilities Code provides as follows:

> "The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

[fol. 141] Under that rule making power the Commission may do all things, whether specifically designated, or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. There is no question but what the record amply shows, and the Commission found, that chaotic transportation conditions are prevalent. There is ample support in this record for the Commission's finding that "Such depressed and unreasonably low rates for government traffic are depressing the revenues of the carriers * * * and if continued will create a burden upon other traffic." (Sheet 4) That being the case, if it is necessary for the Commission to require that common carriers file with the Commission copies of their rate quotations covering the transportation of property for the armed forces, this Commission has ample authority under the rule making power to so require.

Thus, the Commission can accomplish the desired objective by modifying the opinion and order so as to require either the permitted carriers to show on their freight bills the source of the common carrier rates upon which they rely for deviation from the minimum rate, or by requiring the common carriers to file with the Commission copies of their rate quotations covering the transportation of property for the armed forces.

The mere fact that Section 530 of the Code authorizes common carriers to give transportation to the government either free or at reduced rates is no justification for permitting carriers to run hog-wild. This record shows that these chaotic conditions have been brought about in large part, not by the common carriers, but by the permitted carriers. It must be borne in mind that Section 530 of the Public Utilities Code was a part of the Public Utilities Act long prior to the passage of the Highway Carriers' Act. If the Legislature had intended, upon the adoption of the Highway Carriers' Act, that permitted carriers should be given the same privilege, the Legislature would have so

provided. There is nothing in the Highway Carriers' Act that provides that permitted carriers may transport free or at rates less than the minimum rates, property on behalf of the armed forces. It must be presumed that the Legis- [fol. 142] lature, in enacting the Highway Carriers' Act, was well familiar with the provisions of the Public Utilities Act at that time applicable to common carriers. That it did not make similar provision for permitted carriers is clear indication of its specific intention not to do so. The only section of the Highway Carriers' Act bearing on this question is Section 3663:

> "In the event the commission establishes minimum rates for transportation services by highway permit carriers, the rates shall not exceed the current rates of common carriers by land subject to Part 1 of Division 1 for the transportation of the same kind of property between the same points."

Either one or a combination of both methods suggested here will fully protect the provisions of Section 3663.

It is respectfully submitted that it is the duty of this Commission to prevent a continuance of chaotic transportation conditions, and to prevent the depressed and unreasonably low rates which this record proves are in effect, from creating a burden upon other traffic. It is unfortunate that the instrumentalities which the Commission selected for accomplishing these objectives are ineffectual. It is further respectfully submitted that such instrumentalities, having proved ineffectual, it is the duty of the Commission to utilize other means of accomplishing these objectives. Such other means are herein suggested and should be adopted.

Wherefore, your petitioner prays that your Commission reconsider its Decision No. 51047, and modify such decision in accordance with the suggestions herein contained, or, in the alternative, that your Commission grant a rehearing and set this matter for oral argument en banc.

Respectfully submitted,

California Government Traffic Conference, By Edward M. Berol, its Attorney.

[fol. 143] CERTIFICATE OF SERVICE

I, Edward M. Berol, do hereby certify that I have served a copy of the foregoing Petition of the California Government Traffic Conference for Reconsideration, Modification, Rehearing, or, in the Alternative, for Oral Argument en Banc, of Decision No. 51047, Dated January 25, 1955, upon all parties of record who appeared at the hearing of Case No. 5432, Petition for Modification No. 34.

Dated at San Francisco, California, this 11th day of March, 1955.

Edward M. Berol

Certified as a True Copy:

Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

[fol. 144] EXCERPTS FROM UNITED STATES CONSTITUTION

"*Article VI*

"[cl. 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"*Article I, Section 8*

"[cl. 7] To establish Post Offices and post Roads;

"[cl. 12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

"[cl. 13] To provide and maintain a Navy;

"[cl. 16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States,

reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

"[cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And"

"*Article IV, Section 3*

"[cl. 2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

"*Article I, Section 8*

"[cl. 3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

"[cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

[fol. 145] *Federal Rules of Civil Procedure*

Rule 12(b) "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * * (6) failure to state a claim upon which relief can be granted, * * *"

[fol. 146] AFFIDAVIT OF SERVICE BY MAIL

State of California,
City and County of San Francisco, *ss.*

MARCIA MYLAR, being first duly sworn, deposes and says:

That she is a citizen of the United States over the age of 18 years, a resident of the City and County of San Francisco, State of California, and not a party to nor interested in the above-entitled proceeding; that on January 26, 1956, she personally deposited in the United States mail copies of the within Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint addressed to each of the following attorneys:

Stanley N. Barnes, Esquire
Assistant Attorney General of the United States
Washington 25, D.C.

Lloyd H. Burke, Esquire
United States Attorney
Post Office Building
7th and Mission Streets
San Francisco, California

James E. Kiklay, Esquire, and
E. Riggs McConnell, Esquire
United States Department of Justice
Washington 25, D.C.

That said copies were enclosed in sealed envelopes and all postage thereon prepaid; that the attorneys above named have their offices in the respective cities above designated, and that the attorneys for the defendant named in said Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint have their offices in the City and County of San Francisco, State of California; that there is regular daily communication by mail

between said City and County of San Francisco, State of California, and the other cities above designated.

/s/ Marcia Mylar

Subscribed and sworn to before
me this 26th day of January, 1956.

William I. Sullivan, Clerk
Supreme Court of the
State of California

By.....
Deputy Clerk

[Seal]

[fol. 147] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

BRIEF OF THE UNITED STATES OF AMERICA—Filed February 3, 1956

James E. Kilday, E. Riggs McConnell, John H. D. Wigger, Attorneys, Department of Justice, Washington 25, D. C.

Stanley N. Barnes, Assistant Attorney General.
Lloyd H. Burke, United States Attorney.

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[fol. 152] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

BRIEF OF THE UNITED STATES OF AMERICA

Statement

This action is brought, pursuant to the jurisdiction conferred upon this court by Title 28, Sections 1331, 2201, 2281 and 2284 of the United States Code, for the purpose of having this court declare that Section 530, as amended, of the Public Utilities Act of the State of California is unconstitutional and void and for the further purpose of having the Public Utilities Commission of the State of California permanently enjoined from taking action under said provision. The Government's complaint was filed on December 2, 1955, and on the same day the Government's prayer for a temporary restraining order was granted, together with an order to show cause why an interlocutory injunction should not issue pending the final determination [fol. 153] of the action. The order to show cause was made returnable on January 11, 1956. The court extended the return day of the order to show cause until February 8, 1956.

On December 26, 1955, the United States received a notice of motion to dismiss the complaint on several general grounds: (1) that the complaint fails to state a claim upon which relief can be granted, presumably for the broad reason that the challenged provision of the California

statute is constitutional as a matter of law; and (2) that the court lacks jurisdiction over the subject matter of the action in that: (a) the United States has failed to exhaust its administrative remedies; (b) the complaint does not set forth an actual controversy within the meaning of 28 United States Code, Section 2201, conferring upon the court the power to enter a declaratory judgment; (c) the complaint does not set forth adequate grounds for equitable relief; and (d) the court is prohibited from assuming jurisdiction under the so-called Johnson Act, 28 United States Code, Section 1342, which expressly provides that a district court shall not assume jurisdiction over an action questioning the validity of a rate order. The Commission's motion to dismiss will be returnable on February 8, 1956, with the motion for the interlocutory injunction. Briefly summarized, the background facts out of which the action arises, together with the essential facts alleged in the complaint, are as follows:

For many years it has been the uniform practice in the movement of supplies and materiel by the United States for the appropriate officials of the United States to nego- [fol. 154] tiate or enter into special arrangements with the carriers with respect to the rates governing such shipments. Due to the fact that Government property, particularly military materiel, in no sense competes with commercial traffic and due further to the unique character of such shipments, this process of rate determination was always felt to be consistent in every respect with the general purpose of regulatory statutes providing for the publication of tariffs and was a matter of practical necessity. In fact, the recognition of the special requirement for rate adjustments of a different type in Government shipments was deeply rooted in the common law before regulatory bodies were created to regulate common carriers,[1] and when the Interstate Commerce Act was enacted in 1887, providing for the publication of uniform tariffs and prohibiting shipments except in conformity with the tariffs, Section 22 of the Act in recognition of the accepted common

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[1] See discussion in ICC v. B & O Railroad, 145 U. S. 263, 278; Nashville C. & St. L. Railroad v. Tennessee, 262 U. S. 318.

law doctrines expressly exempted Government shipments from the general terms of the Act. Although of course the exemption in the Interstate Commerce Act has no direct legal relation to purely intrastate shipments, until recent years it has always been assumed that state regulatory statutes did not apply to such shipments and in fact it has been the long established practice for the officers of the United States to negotiate for the transportation of Government property without any distinction whatsoever between shipments that might be classified as intrastate or interstate under applicable principles of constitutional law. It is obvious that the basic reasons for the special [fol. 155] special treatment of such shipments apply with equal force regardless of the geographic termini of the carriage. It has only been in the past five years that any state or person has seriously contended that a state had authority to regulate the rates for such shipments.[2]

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[2] A number of years ago the State Commissions of Arizona and Illinois expressly ruled that the statutes involved in these states did not apply to Government shipments. Arizona Corporation Commission, General Order No. 101-R, March 26, 1925, Illinois Commerce Commission, Conference Ruling No. 2, March 17, 1931. The Public Service Commission in Louisiana asserted jurisdiction in 1949. In 1954 its action was set aside by the Supreme Court of Louisiana. See Kansas City Southern Railroad Co. v. Louisiana Public Service Commission, et al., 73 So. (2) 788, decided April 26, 1954, Supreme Court of Louisiana. Kentucky asserted jurisdiction in 1952. See Hughes Transportation, Inc. v. United States, 121 F. Supp. 212. The State of Pennsylvania asserted jurisdiction in 1954. See order Pennsylvania Public Utility Commission, June 15, 1954. The United States has brought an action in the Superior Court of Pennsylvania to set this order aside. On August 10, 1955, the Attorney General of Texas expressed the opinion that the Texas statutes conferred upon the Railroad Commission of Texas the power to prescribe rates for Government shipments. This opinion was implemented by notice of the Commission dated August 29, 1955, directing the carriers to cease carrying Government property except upon the terms and conditions prescribed by the Commission. On September 30, 1955, the railroads of Texas brought an action to have the Commission enjoined from asserting jurisdiction. On October 19, 1955, the United States intervened in the action and asserted that the statute as interpreted by the Attorney General was unconstitutional. A full hearing was held on November 9, 1955, and on December 14, 1955, the Dis-

[fol. 156] For many years the legislature of California evidently recognized the fact that transportation of property for the United States was unique and accordingly Section 530 of the Public Utilities Code expressly exempted such transportation from the provisions of the statute relating to the filing of tariffs and the approval of rates and for a great many years shipments have been made by the United States between its installations in California in accordance with the long established general custom of making special arrangements or contracts for the shipments. In July 1955, the legislature amended Section 530 and deleted the express exemption from the general provisions of the code of shipments of property of the United States and substituted in its stead an amendment which expressly provided that "The Commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable."

The gravamen of the Government's case lies in its assertion that the subjugation of the function of supplying the military establishments and related activities of the Federal Government to the jurisdiction of the Commission in this way unreasonably and unnecessarily impedes and burdens the United States in the discharge of its constitutional responsibilities and further places an unreasonable burden on interstate commerce.[3] The United States avers

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trict Court of Travis County, Texas, filed a declaratory judgment stating that the Texas statutes did not prohibit the United States from shipping in Texas upon the terms and conditions arrived at by special negotiation with the carriers. The court in the judgment and in a press release intimated that in its feeling a different interpretation of the statute would render it unconstitutional. Texas and Pacific Railway Company, et al. v. Railroad Commission of Texas, et al., District Court of Travis County, Texas, 126 Judicial District No. 102,513. The press release issued by the court in this case is attached hereto as Appendix A.

[3] In Paragraph III of the complaint the United States sets forth the basic reasons why it is practically necessary that Government shipments must be made according to special arrangements and should not be subjected to state regulation with respect to rates. In Paragraph IV of the complaint the Government sets forth in more detail how the effort on the part of the Public Utilities Commission of California to regulate the rates for such shipments

[fol. 157] that this impediment placed upon the discharge of its constitutional responsibilities does not serve any useful end within the police powers or other reserved powers of the State of California and that therefore the amended section of the statute is unconstitutional under elemental constitutional principles. In the complaint the United States sets forth in rather full detail the factual basis for its contention.[4]

In considering the Government's position on the merits, it is respectfully submitted that several things should be borne in mind at the outset. In the first place the United States does not in any way question the general authority of the California Commission to regulate the various carriers subject to its jurisdiction in any way relating to the safety of operation or the use of the highways or to any measure or regulation designed to promote the safety and proprietary interest of the State of California. In engaging carriers in California to carry its property, the United States as a matter of policy is assiduously careful to see to it that none of its property is carried by any carrier which does not completely conform to the regulations of the Commission designed to safeguard the citizens of the State as a whole. The complaint of the United States is directed only toward the regulation of the rates. It [fol. 158] should likewise be borne in mind that the United States in no sense questions the capacity of the Commission to arrive at generally reasonable and equitable rate structures in matters within its jurisdiction. In fact it might be stated that all the officials of the United States have the highest regard for the technical capacity of the California Commission so there is no problem raised here of

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would interfere with and impede the discharge of the constitutional responsibility. Section V of the complaint contains allegations of fact which are designed to rationally demonstrate the proposition that no useful purpose from the standpoint of the citizens of California as a whole can be served by the regulation of the rates for such shipments.

[4] Of course, it is axiomatic that the basic allegations of fact are admitted for the purposes of defendant's motion to dismiss and if the facts as alleged raise a serious constitutional question, the motion should be denied. *Gibbs* v. *Buck*, 307 U. S. 66, 77.

the reasonableness of any rate structure. *The sole contention of the United States is that any regulation of rates to be charged it will of necessity from the nature of the rate regulation process unreasonably impede it in the carrying on of its constitutional duties.* Further, it seems important to bear in mind that the question presented in this case has become a general one. As previously pointed out, within the last five years the Commissions in four states have asserted jurisdiction over intrastate shipments of Government property and there is every indication that if this court sustains the constitutional powers of states to do so, many, if not all of the states, will follow suit. Therefore, the issue in this case is not one involving singly the statute of California but from the nature of things involves a deep and broad general principle of national application.

This brief in the first instance is designed to set forth the merits of the United States' claim in connection with the balancing of conveniences at the hearing for the request for an interlocutory injunction.[5] The original complaint was verified by the Chief for Transportation of the Bureau of Supplies and Accounts of the Navy, who likewise [fol. 159] attached an affidavit setting forth the grounds for granting a temporary restraining order. At the hearing on the application for an interlocutory injunction, additional affidavits of the Chiefs for Transportation of the Army, Air Force, and the General Services Administration will be submitted. Secondly, the brief is designed to meet the Commission's motion to dismiss. Since the Government's position on the merits at the hearing on February 8, will be basically the same as the position taken at the final hearing, the brief is being prepared on the assumption that it will be the United States' main brief in this proceeding. Of course, the United States would like to reserve the right to file a supplemental brief prior to the final hearing covering any question which may be of interest to the court.

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[5] The United States will not burden the court with an elemental discussion of the general equitable principles applicable to the balancing of conveniences on a motion for an interlocutory injunction.

For the sake of simplicity, insofar as illustration is concerned, this brief will be directed toward the application of the sections of the statutes in question to the shipment of military materiel. Such materiel is by far the most important component of Government shipments. In the brief no effort will be made to collate authorities in an encyclopedic manner. The constitutional principles are relatively simple and the cases arising out of their application to varied fact situations are myriad. Only landmark cases and those of particular pertinence will be referred to.

I

The Court Has Jurisdiction Over This Action.

In its motion to dismiss, the defendant challenges the jurisdiction of this court over the subject matter of this action. When the rhetorical matter is winnowed from the [fol. 160] motion, there seem to be several principal grounds for the defendant's contentions in this regard:[6]

(1) that the Government "has failed to exhaust the administrative remedy available to it in a proceeding before the defendant Public Utilities Commission";

(2) that the complaint fails to allege facts showing the danger of irreparable injury to the Government and the existence of "an actual controversy" and thus fails to lay the basis for declaratory and equitable relief;

(3) that the case involves a matter which is within the primary jurisdiction of the defendant Commission;

(4) that the relief sought by the Government is prohibited by the Johnson Act, 28 U. S. C. 1342;

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[6] The motion to dismiss actually contains seven separately stated grounds for the contention that the court does not have jurisdiction over the subject matter of the action. It will be observed that the basic ideas behind these separately stated reasons are intertwined and overlapping. It is felt that the basic contentions can be telescoped and dealt with under five headings.

(5) likewise, the defendant in Paragraph (f) of its motion seems to contend that the court should abstain from granting the relief requested, presumably because the United States has not first resorted to state procedures, including action in the state court.

It is felt that each of these grounds is without merit. They will be treated in order.

(1) The contention that this court does not have jurisdiction over the subject matter of this action on the ground that the United States has failed to exhaust its ad- [fol. 161] ministrative remedies obviously proceeds on a complete misconception of the nature of the suit. It should always be borne in mind that in the instant case the Government does not question the validity of any action of the Commission, past or future, but simply and solely *takes the position that Section 530 of the Public Utilities Code and related sections which confer upon the Commission the duty and responsibility of regulating the rates for the carriage of Government property are unconstitutional. The gravamen of the Government's case lies in its assertion that from the nature of the rate regulating process any subjection of it to the process will directly and drastically interfere with its constitutional responsibilities,* principally that of supplying the armed services. It is axiomatic that an administrative body cannot pass on the constitutional validity of the legislation conferring upon it the power to operate. As stated by Chief Justice Vinson when he was on the Court of Appeals in *Panitz* v. *District of Columbia,* 112 F. 2d 39, at pages 41-42:

> The first—Did the assessor, as an administrative official, have inherent power to rule on constitutional objections to the tax? It has been said that the necessities of our system require the judiciary to determine the constitutionality of Acts of the legislature. There can be little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise. Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary but argues

> as well against its exercise by other agencies. It is this consideration for the orderly, efficient functioning of [fol. 162] the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate.

See also *Engineers Public S. Co.* v. *Securities and Exchange Commission,* 138 F. 2d 936, at page 952, *et seq.*, and cases cited; *Southern Blvd. R. Co.* v. *City of New York,* 86 F. 2d 633, certiorari denied, 301 U. S. 703. In short, there is no administrative remedy to exhaust.

In spite of the seemingly obvious application of this axiom to the present case, the United States has been advised that the Commission feels that it finds justification for its position that the United States has not exhausted its administrative remedies in two closely related cases recently decided by the Supreme Court, *Public Service Commission of Utah* v. *Wycoff,* 344 U. S. 237, and *Public Utilities Commission of California* v. *United Air Lines,* 346 U. S. 402. However, it is felt that a study of these cases will clearly reveal that they have no application to the instant case. In the *Wycoff* case, the plaintiff brought an action in a single-judge district court asking for a declaratory judgment, declaring that his local operations as a motor carrier were interstate in character and therefore not subject to the jurisdiction of the State Commission. It will be noted that the plaintiff did not contend that any statute of Utah was unconstitutional. In disposing of the appeal, the Supreme Court held primarily that under the circumstances of the case the plaintiff was not threatened with any immediate injury, and that, therefore, the case [fol. 163] was an improper one for declaratory and equitable relief. In reaching its conclusion, the court observed that the sole issue in the case, namely, whether or not under the particular facts the plaintiff's operations were interstate or intrastate, presented a mixed question of law and fact which under standard doctrines was initially for the Com-

mission. See opinion, page 246. In making this observation, the court merely reiterated the long established principle of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The court further observed or implied that the doctrine of the *Myers* case had particular significance in cases where the relationship between the Federal courts and state agencies was involved, because the resolution of the mixed question of law and fact by the state agencies might obviate the necessity of resolving a constitutional issue. See opinion, page 247.[7]

Similarly, the *United Air Lines* case primarily involved simply the question of law and fact as to whether or not the air space between Catalina Island and the mainland of California was within the boundaries of the State of California and therefore air travel between the Island and mainland was a proper subject matter for the jurisdiction of the State Commission rather than the Federal Civil Aeronautics Administration. Without considering any constitutional issue, the district court assumed jurisdiction and held that under the facts of the case the air space in question [fol. 164] fell without the legal boundaries of the state.[8] The Supreme Court peremptorily reversed the District Court for disposing of this mixed question of law and fact, simply citing the *Wycoff* case.

It seems apparent that these two holdings have no application in the case at bar. Here, there is no mixed question of law and fact of the usual type disposed of by administrative agencies under long established principles. *There is absolutely nothing which the Commission may determine which would do away with the ultimate necessity of the resolution of the constitutional issue by a duly authorized court.*

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[7] Of course, it is axiomatic that a court will not pass upon the constitutionality of a state statute or other state action if a particular case can be resolved on some other issue. See cases cited in *United Air Lines* case 109 F. (S) 13 in Note 1, page 15.

[8] In the original complaint, the plaintiff did raise the question of constitutionality of certain sections of the California Code. However, it seems apparent that they did not press their constitutional position upon the court and the court expressly stated in its opinion that it did not consider the constitutional aspects of the case. 109 F. (S) 13.

(2) The Commission's further claim that this is not a proper case for declaratory judgment and injunctive relief is equally without merit. In the first place, no person remotely affected should be subjected to a statute if in fact the statute is unconstitutional. See statement of Judge Parker in *Wallace* v. *Currin*, 95 F. 2d 856, at page 861, aff'd 306 U. S. 1, at page 9. Further than this, for the reasons set forth fully in the complaint, the injury to the Government would be far-reaching and immediate once the amendment to Section 530 is permitted to go into effect. The amendment, it should be noted, does not maintain the status quo pending a Commission determination of the "extent" to which the Commission will permit special rates for Government shipments and the "conditions" on which it will permit such rates. Therefore, at the moment it goes [fol. 165] into effect, the long established practice of negotiating special rates for Government shipments must grind to a halt. At that moment, under the threat of jail sentence and fine, the officers of the United States will be prohibited from negotiating with carriers for special rates, and the carriers will be prohibited from transporting Government shipments except at rates specified in published tariffs. At that moment, as set forth in detail in the complaint, the United States would suffer irreparable injury, including both substantially higher transportation costs and serious disruption of the military supply lines.

It should be noted that the situation thus presented is entirely different from that which was before the court in the *Wycoff* and *United Air Lines* cases. In the first place, in neither of these cases were the plaintiffs confronted by immediate subjection to a statute which they alleged to be unconstitutional. Further, in both of these cases the matters were still in the investigative stage and the complainants could in no way be injured prior to a formal proceeding either before the Commission or a court, or both, and such a proceeding might result in a decision in their favor. Under these circumstances, the only damage which the plaintiffs could sustain would be the expense of participation in a Commission or court proceeding. Accordingly, the Court concluded that the actions were anticipatory in nature, brought for the primary design of having a jurisdic-

tional fact prejudged by a Federal Court for the purpose of defense in a direct proceeding before the Commission or in the state courts. For all the reasons above stated, the instant case presents an entirely different situation. In fact, it is submitted that this case could be used as a [fol. 166] classical example of the type of case in which declaratory and equitable relief are absolutely necessary."

(3) For the reasons above stated, it is obvious that the primary jurisdiction doctrine is inapplicable here. When analyzed, the defendant's contention in this regard seems to be tantamount to an assertion that the various state administrative agencies, rather than the duly authorized courts, have the primary responsibility of deciding issues of constitutional law arising under the Federal Constitution. See *Engineers Public S. Co.* v. *Securities and Exchange Commission*, 138 F. 2d 936, at page 952.

(4) The Johnson Act, 28 U.S.C. 1342, has no bearing on the instant action. That Act prohibits, under certain conditions, federal injunctions against "any *order* affecting rates chargeable by a public utility and made by a State administrative agency . . ." [Emphasis added.] No such "order" is even remotely involved in this case; the relief sought by the Government is directed against a statute—namely, the amendment to Section 530.

(5) The Commission seems to contend in Paragraph (f) of its motion that this court should not proceed finally to determine this case until some further action is taken [fol. 167] by the state courts. In considering this position on the part of the defendant, it seems appropriate for the

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[9] This precise issue was raised and thoroughly considered in The Texas and Pacific Railway Company v. Railroad Commission of Texas, supra, and in the judgment of the District Court filed on December 14, 1955, it was stated:

> that there is an actual and bona fide controversy existing between the plaintiffs and plaintiff-intervenor on the one hand, and the defendants and defendant-intervenors on the other, and that the plaintiffs and plaintiff-intervenor should have declaratory relief to terminate the uncertainty and controversy giving rise to this suit.

(This holding was made under the Uniform Declaratory Judgment Act which has been enacted in Texas.)

United States to state that a suit in which the United States contests the validity of a state statute under the Federal Constitution is always regrettable from its point of view, and such a proceeding is reluctantly entered into with a spirit of great deference to the sovereign rights of the state involved. It should be noted that in the cases in Louisiana, Pennsylvania and Texas, involving the same issue as that involved in the instant case, the United States proceeded in the state courts. This was done for the obvious reason that the statutes in these states were general in their terms and involved questions of interpretation which might obviate the necessity of resolving the constitutional issue. See *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *American Federation of Labor* v. *Watson*, 327 U. S. 582. In the instant case, due to the repeal of the express exemption in Section 530 and the enactment of the amendment which expressly subjects the shipments of Government property to the jurisdiction of the Commission, it is clear that the statute is unambiguous on its face and thus there is no reason for interpretation by the state courts. Under such circumstances, it is well understood that the Federal Court should assume jurisdiction and proceed with the final disposition of the matter as quickly as possible.[10] In fact, the specially constituted three-judge District Court with expedited procedures for review was created primarily for the precise purpose of speedily and finally disposing of these important and fundamental con- [fol. 168]. stitutional questions. See *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10; *Query* v. *United States*, 316 U. S. 486.

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[10] See *Russo* v. *Reed*, 93 F. Supp. 554; *Lee Optical of Oklahoma* v. *Williamson*, 120 F. Supp. 128; *Toomer* v. *Witsell*, 73 F. Supp. 371, at page 385, aff'd. 334 U. S. 385. See Note 15, page 392.

II

It Is Axiomatic That Any State Statute Which Places an Unreasonable Burden or Impediment on the Discharge of a Federal Function Is Unconstitutional. In Any Particular Case the Question of the Validity of Such a Statute Always Resolves Itself in the Balancing of the Local Interest Involved Against the National Interest With Which the Statute Interferes. In the End, the Determination Must Be Made on the Unique Facts in the Particular Case.

Ever since Chief Justice Marshall's landmark decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, it has been a postulate of our constitutional system that a state government, through statute or regulation, cannot unduly or unreasonably interfere with the discharge by the Federal Government of its duties and responsibilities under the Federal Constitution. As there stated, the supremacy clause of the Constitution was designed (page 427) "to remove all obstacles to its (the Federal Government's) action within its own sphere."

Throughout the years the Supreme Court and the various inferior courts have applied the underlying doctrine of *McCulloch* v. *Maryland* in myriad situations in which in some way or another a state statute or regulation impedes the Federal officials in carrying out their proper duties.[11] In doing so, it is too plain to warrant detailed demonstration that the courts have always been assiduously careful [fol. 169] to recognize and guard the sovereign responsibilities of the local or state government, and in every case it is evident that an effort has been made to accommodate the sovereign duties of the two governments to the end that the nation as a whole might attain the full fruits of the Federal system. Thus, in the last analysis; in any particu-

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[11] See the following leading cases: Osborn v. United States, 9 Wheat. 738; Weston v. City Council of Charleston, 2 Pet. 449; Thomson v. Pacific Railroad, 9 Wall. 579, 590-591; Ohio v. Thomas, 173 U. S. 276, 283; Matter of Heff, 197 U. S. 488, 505; Johnson v. Maryland, 254 U. S. 51, 55-56; and Hunt v. United States, 278 U. S. 96.

lar situation the problem becomes one of balancing the local against the national interest in the light of the purpose of the local regulation and the importance of the national function involved and the degree to which the local regulation interferes with the national function. From the nature of things each case is unique and in the end the question presented cannot be resolved by resort to conceptualistic legalism but can only be determined by a straightforward facing of the facts involved. As stated by Chief Justice Stone in *Parker* v. *Brown*, 317 U. S. 341 (a case in which the court sustained a California statute regulating the raisin industry in that state) at page 362:

> Such regulations by the state are to be sustained, not because they are "indirect" rather than "direct," see *Di Santo* v. *Pennsylvania, supra*; cf. *Wickard* v. *Filburn, supra*, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. *But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved,* [fol. 170] *may never be adequately dealt with by Congress.* Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate Cases, supra*, 398-412; *California* v. *Thompson, supra*, 113. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it. [Emphasis supplied.]

Facing the facts in the instant case, no one can gainsay that the supplying of the armed service stations throughout the nation and the world is one of the most essential

and important responsibilities imposed on the federal establishment—in fact, in this time of crises, it is probably the most important one. It is self-evident that the arrangement for transportation of the supplies lies at the very heart of the discharge of the responsibility. It is equally plain that a statute or regulation of a state which prohibits common carriers from entering into contracts or arrangements with the United States for the transportation of supplies to its various installations, except on terms imposed with respect to rates, directly and unequivocally interferes with and intrudes upon the discharge of the Federal responsibilities. In fact, since from the nature of things a contract is mutual and correlative, it is plain that such regulation absolutely abrogates the freedom of contract of the United States in this essential orbit of its [fol. 171] activity. Thus, in the end, the crux of the question in the instant case is whether or not the prescription of rates in intrastate shipments of Government property is of such importance to the health, welfare, or other legitimate interest of the State of California, that it overbalances the obvious impediment that it would place on a movement of United States materiel and personnel within the state. In a comparatively recent case, Mr. Justice Jackson posed the question with some degree of preciseness in the light of the long established doctrine in *McCulloch* v. *Maryland, supra,* and probably indicated the answer in *United States* v. *Allegheny County,* 322 U. S. 174, at page 182.[12]

> The Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . . " Art. IV, § 3, cl. 2. It also gives Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution" all powers vested in the Govern-

[12] This case involved the validity of a state tax statute and therefore for reasons which will hereafter be pointed out is distinguishable from the case at bar. It is felt, however, that the statement above is a clear modern exposition of the deep constitutional principle that underlies all cases where there is conflict between federal and state functions.

ment or in any department or officer thereof, Art. 1, § 8, cl. 18, and it makes the laws of the United States enacted pursuant thereto "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper [fol. 172] exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls.[13]

For reasons which will hereinafter be stated, the United States feels that the Acts of Congress relating to the negotiations for transportation have expressed a clear policy with respect to the shipment of Gove nment property, both interstate and intrastate. Under the supremacy clause and accepted constitutional doctrines, of course, such an expression must control. Be this as it may, where the interference

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[13] In Osborn v. United States, 9 Wheat. 738, at page 867, the Supreme Court said:

Can a contractor for supplying a military post with provisions be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed, as the property of other citizens, and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control.

by the state statute or regulation is clear and drastic, it [fol. 173] is firmly established that the Constitution itself, without any implementing statute of Congress, is self-executing, and, accordingly, any state statute or regulation which violates the essential purpose of the basic constitutional principles must fall. *Ohio* v. *Thomas*, 173 U. S. 276; *Johnson* v. *Maryland*, 254 U. S. 51; *Hunt* v. *United States*, 278 U. S. 96; *Arizona* v. *California*, 283 U. S. 423. See *Penn Dairies* v. *Milk Control Comm'n.*, 318 U. S. 261. See Mr. Justice Frankfurter's opinion in *Freeman* v. *Hewit*, 329 U. S. 249, particularly at page 252.

III

The Lines of Supply of the United States Are Interwoven Into a Highly Integrated and Synchronized System Operated on a Nation-Wide and World-Wide Basis. The Primary Design of the System Is to Meet the Logistical Needs of the Nation in the Light of Its Broad Strategic Plan in the Present World Situation. Any Local Interference With the System Is Certainty a Matter of National Concern.

It is perfectly apparent that modern problems of supplying our armed services have little or no relationship to the situation that existed fifty or sixty years ago, when some quartermaster, of the type of General Grant when he was a junior officer, would go out and procure supplies for a garrison or detachment locally by foraging or purchasing from some local store or provisioner; or the munitions arrived by occasional wagon trains from some rail head. The weapons of modern war are tremendously complicated, expensive, varied, and heavy. Under the doctrine of dispersal as a defense against air attack, the manufacture of these intricate weapons takes place in all parts of the country. It is likewise apparent that the basic theories of modern warfare involve quick movements over great distances with a fluid and flexible system of supply ready at [fol. 174] all times to sustain operations on a moment's notice at any quarter of the globe. As never before, time is of the essence in attaining surprise and meeting surprise. Thus, it is of absolutely primary importance that the

United States have a carefully thought-out plan of supply, with vast stores of reserves strategically disposed throughout the nation and the world for the purpose of meeting the various conceivable contingencies. Accordingly, there has been established what is sometimes called a depot system, which naturally has no relationship whatsoever to geographic state boundaries, but is in fact nation-wide and world-wide both with respect to the location of the installations and their function. There is a constant flow of materiel through this system, at a velocity and in directions determined by the needs of the military establishments and operations at any given time. Several illustrations might be useful to demonstrate the integrated nature and complexity of the system. During the First World War, the rail facilities serving the ports of embarkation became so congested that box cars were backed up on sidings for distances of 200 miles inland. After this experience, a plan was devised whereby a series of storage points were established at short distances of 50 or 100 miles inland where materiel could be delivered and then carried down to the ports of embarkation when shipping was available. During World War II, supplies came into these depots from all over the country and were held for varying periods of time depending on particular situations. The system serves several purposes. In the first place, it saves railroad and other transportation facilities. Secondly, it disperses the materiel and makes the port of embarkation less vulnerable to air attack. Thirdly, in the last war, when the enemy [fol. 175] operated fleets of submarines in the shipping channels, it enabled diversions to ports leading to sea lanes most free from submarine attack. Another illustration of the function of the depot systems is found in the Sharpe General Depot located a short distance from Stockton, California. This depot is closely integrated with the Utah General Depot located at Ogden, Utah. In many particulars it supplies installations located within the states of Arizona, California, Idaho, Montana, Nevada, Oregon, Utah, and Washington. In addition to its function in supplying troops within the continental limits of the United States, it likewise has the responsibility of supplying troops stationed in the Pacific. Thus, rations, blankets and clothing, which are

manufactured in the middle west or some manufacturing center in the east, through intermediate storage points might finally arrive at the Sharpe General Depot, then with great regularity be shipped out to some installation like Fort Ord, or might be shipped to San Francisco for shipment to Japan or Okinawa. Again, depending on particular needs, shipment might be made to Fort Huachuca in Arizona. Similarly, the Benicia Arsenal located at Benicia, California, is a large storage facility for ammunition and various types of ordnance. Thus, a tank which is manufactured in Detroit through intermediate storage points might arrive at the arsenal and in a short time be shipped to some training center in California, or it might be shipped to some armored division maneuvering in the desert in Arizona or Nevada, or again it might be shipped overseas to Formosa. Similarly, ammunition manufactured in the middle west through intermediate points might arrive at the arsenal and be distributed over broad areas depending on the strategic or tactical situations at any particular [fol. 176] time. Port Chicago furnishes a very good illustration of the operation of the depot systems in the naval supply functions. This is one of the large ammunition depots in the world. Ammunition arrives at the arsenal and magazines at Chicago from all over the United States. From there it is shipped out into the Pacific, to training areas in California and elsewhere. Similarly, the navy supply center at Oakland is a tremendous depot, with world-wide functions. Supplies from nation-wide and world-wide sources are funneled through this depot and distributed everywhere. Similarly, the Norton Air Force Depot at San Bernardino furnishes an illustration of the complex system of supplies necessary for the maintenance of the air force on a world-wide basis. Engines come into this installation daily from all over the world and are shipped out daily to all points in the world. Illustrations might be given *ad infinitum*.

Thus, the current of supplies is continuous, rapid and far-flung. One salient thing stands out. The supply system is intricate, highly integrated, nation and world-wide in its operation and of vital concern to the country as a whole. Thus, any interjection of a state regulation or

statute into this intricate mechanism must be examined with great care under appropriate constitutional principles.

IV

The Regulation of Rates by the Commission For Carrying Property for the United States Would Seriously Interfere With the Lines of Supply and Place a Great Burden on the Officers of the United States Charged With the Responsibilities of Performing the Supply Function.

Due to the fact that the ports of California are the approaches to the Orient, and for climatic, topographic, and other reasons as well, approximately 153 military installa- [fol. 177] tions are situated within the state. This is the largest number of such establishments located in any single state. Many of these installations are of extreme importance and perform nation-wide and world-wide as well as local functions. If the common carriers and other carriers within the state were prohibited from making special arrangements for the transportation of property from one of these installations to another, the confusion, inconvenience, expense and general damage to the operation of the supply function would be great indeed. This for the following reasons:

1. In the first place, the pattern of military operations requires that items of many types and description, unsegregated from each other, must be moved at one time. For example, a shipment of airplane parts from Norton Air Force Depot to Edwards Air Force Base at Muroc might involve a carload of a thousand different items consisting of airplane parts of various types and sizes. This practice of shipping a mass of supplies, which is unusual in commercial shipments, would involve an intolerable amount of expense, paper work and confusion if it were necessary to apply the ordinary tariff classifications to the numerous items shipped. Similarly, frequently a division will be moved from one station to another and its impedimenta will be shipped in mass without any effort to classify the various items.

2. Military shipments, unlike the average commercial freight which moves rhythmically, are initiated on extremely short notice, particularly in times of emergency. Frequently, time is of the absolute essence. Accordingly, in many situations it is necessary to make shipments immediately and make arrangements for rates after the transportation is complete. If it were necessary to ship only in [fol. 178] accordance with published or approved tariffs, this necessarily flexible procedure would be completely done away with.

3. Closely related to the observation above, military shipments usually move in directions that have no relation to the channels of commercial traffic, for the obvious reason that they are initiated for the purposes of defense and not for purposes of trade. Likewise, for practical reasons, it is common for military installations to be located in out of the way places. Thus, it would be difficult, if not impossible, to have a complete set of rates for Government shipments which have been approved by the Commission. Accordingly, in many situations there would be no appropriate approved rate to govern the particular shipment, and where time was of some importance, there would be an unnecessary and burdensome delay in completing the movement pending such time as the Commission might require for the granting of approval.

4. Under the theory of rate making, of course, it is firmly established in California and elsewhere that carriers must have a published rate in existence at all times to govern all conceivable movements from all conceivable points. This rate structure is known as the class rate or "paper rate" structure. It is well known that this class rate structure is greatly higher than the commodity or going rate structure which can be worked out readily in commercial trade. Due to the variety of commodities shipped by the military and the Government generally and the irregular nature of the pattern of traffic of such movements, both with respect to time and direction, it would be virtually impossible to have approved rates in existence to cover all situations. Thus, in many particular situations where time [fol. 179] was of the essence, the shipment of military

materiel would of necessity be thrown into the class rate structure, usually under the residuary clause. This could only result in a tremendous increase in the expense of the transportation for the Government. In many situations this increased expense would be extremely inequitable because the volume and density of the traffic would from the nature of things entitle the movement to a rate comparable to the commercial rate for a similar shipment. Of course, with a debt of over 250 billion dollars and a budget which allows almost 50 billion dollars a year for defense purposes, this increased item of expense presents a great danger, particularly when it is remembered that the principle involved in this case is one of nation-wide application. In the end, of course, any increased expense in the defense budget must be borne by the taxpayers at large, including the taxpayers of California. It is common knowledge that many thoughtful persons today feel that the primary requirement in present-day Government is to limit in every way, consistent with the national security, the amount spent for purposes of defense. In fact, some people feel that the essential design of our potential enemy is to bring about a situation in which the country is placed under ever increasing internal strain due to the mounting debt for munitions and instruments of war.

5. It is self-evident that many shipments of military materiel involve an element of extreme secrecy. For example, at some particular time, it may be necessary to ship atomic bombs from some depot to a storage point out in the desert. There would most likely not be any approved rate covering such shipment. In order to comply with the provisions of Section 530, it would be necessary to reveal the nature of the shipment to the Commission. It is an [fol. 180] axiom of military science that it is absolutely necessary to confine vital information to as few people as possible.[14] Thus, the officers would be placed in a dilemma

[14] With respect to the importance of limiting vital military information to as few people as possible, see Henderson's Stonewall Jackson, particularly page 333. Frequently General Jackson would not reveal his plans or other important intelligence even to his second in command and often quoted Frederick the Great's maxim, "If I thought my coat knew my plans, I would take it off and burn it."

of either shipping at the class rate under coded designations or violating an essential military doctrine. Not only might it be necessary to reveal such information to the Commission itself, but under the theory of California statutes in certain situations a public hearing would be required. Of course, it is unthinkable that information of the movement of atomic bombs should be paraded in public. Yet, pressed to its logical conclusion, Section 530 as amended would bring about this result.

6. In addition to the fact that particular shipments require a high degree of secrecy, it is also apparent that if it is mandatory that a set of approved and published rates and tariffs be in existence throughout the nation governing the movement of military materiel, intelligence agents of foreign powers by standard interpretive procedures might gain clear and intimate knowledge not only of our installations and their functions but the general direction of our movements and thus surmise our strategic or tactical plan at any particular time. Information of this sort is of particular importance today when one of the primary aims of any intelligence service is to determine the vital targets for air attack.

[fol. 181] 7. It is apparent likewise that the mere administrative detail of complying with the requirements of Section 530 would be burdensome and expensive. There would be the necessity for proceedings before the Commission, which in many instances might be very elaborate and long drawn out. Various highly trained officers and employees of the military would be required to spend valuable time preparing exhibits and testifying. In addition, in many situations, it is difficult to determine when a particular shipment is, under our constitutional system, interstate or intrastate. Thus, in many situations, the various transportation officers might have to consume time and energy in trying to make difficult determinations with respect to the character of particular shipments. Of course, at a time when economy of force is absolutely essential, the use of man hours for administrative detail of this type should be kept at a minimum.

8. There is another aspect of the matter which would tend to increase the confusion and create an additional

administrative burden. Of course, most military materiel has no final resting place until it is consumed on the line or in some other military activity. Thus, whenever it is possible the officers of the United States try to arrange a through rate for the carriage of supplies to the final destination with a transit privilege for storage enroute. Materiel with transit or storage privileges is mingled indiscriminately with similar materiel which for one reason or another is not subject to transit privileges. It has been the practice for purposes of administration to treat such materiel as fungible, and the privilege will attach to items going outbound from a storage point even though the particular [fol. 182] items were not the identical ones which came into the storage point with the privilege. For example, there may be a shipment of jeeps from the Detroit area to Sharpe General Depot with transit privileges for storage there with a through rate negotiated for further shipment to San Francisco and thence overseas. These jeeps might be mixed in a warehouse or on a lot with jeeps which were sent to the Depot from San Francisco. Subsequently, the jeeps which arrived from San Francisco might be sent back to San Francisco on the through rate. It is clear that the application of Section 530 of the Public Utilities Code would completely disrupt this useful and time saving practice. It would seem that it would become necessary to segregate items with transit privileges and no doubt inspections of various sorts by state officials and others would become necessary.

9. Lastly, it might be said that in certain situations carriers might want to carry for the Government as a patriotic duty. So far no one has ever carried Government property for nothing. However, it is not inconceivable that in extreme situations certain individuals and concerns might feel it a patriotic duty to rally. A statute of the type involved in this case would have prevented the taxi drivers of Paris from carrying the men and weapons of Marshal Joffre to the first battlefield of the Marne, or would have been designed to prevent the operators of the regular channel boats from removing the troops at Dunkirk. So far our wars have been far from our shores and the illustrations may be extreme. However, the principle is one to be cherished.

[fol. 183] V

It Is Submitted That Commission Regulation of Rates For Carrying Property For the United States Would Not Benefit the Citizens of California in any Way Whatsoever. In Fact, It Is Felt That Just the Contrary Would Be True.

In considering this aspect of the matter several self-evident considerations seem pertinent.

1. In the first place, it should be borne in mind that in arranging for transportation of property of the Government the responsible officers assiduously follow the established policy of dealing only with common carriers completely qualified under the local laws. Thus, in California, the Government would never engage a carrier which is not certificated and registered as required and had not met all the requirements with respect to safety and insurance and other matters designed to protect the highways and the interests of the citizens of the state.

2. It is well understood that a statutory provision, either national or state, providing for the publication of tariffs and the uniformity of rates thereunder, is designed to prevent discrimination or unreasonable prejudice to persons or localities. It is perfectly apparent that the commodities shipped by the United States, both from the standpoint of their intrinsic characteristics and their intended use, are in no sense in competition with commodities shipped by commercial shippers. Therefore, there can be no discrimination or prejudice to persons or localities if these commodities are shipped by special arrangements and not by uniform tariffs. This patent truth has been frequently recognized by various state courts in construing particular state statutes as not being applicable to ship-[fol. 184] ments for the Government. *State* v. *Missouri, K. & T. R. Co.*, 262 Mo. 507, 172 S.W. 35; *New York Telephone Co.* v. *Siegel-Cooper*, 202 N.Y. 502, 96 N.E. 109; *Am. Jur., Carriers*, § 237; *R. C. L., Carriers*, § 85; *Kansas City Southern Railroad Co.* v. *Louisiana Public Service Commission, supra.* Similarly, various state commissions have held that the state statutes requiring publication of

tariffs were inapplicable to Government shipments. *Arizona Corporation Commission*, General Order No. 101-R, March 26, 1925; *Illinois Commerce Commission*, Conference Ruling No. 2, March 17, 1931. The Comptroller General of the United States reached the same conclusion with respect to the Louisiana statute in 15 Decisions of the Comptroller 648. In enacting the Interstate Commerce Act, Congress expressly recognized the inapplicability of the general provisions of the Act designed to prevent discrimination and prejudices by expressly exempting Government shipments in Section 22 of the Act.

3. In many situations the transportation officer for the United States in arranging for a particular movement might have alternate routes conveniently open, one of which would cross a state line and therefore clearly involve interstate commerce which would not be subject to regulation. Under such circumstances, the officer might find it more economical to ship by special arrangements than in accordance with the published tariffs. If so, he would feel it a duty to select the interstate route, and thus the local carriers in California would be prejudiced for no good reason.

4. It is plain that any change in the rate structure in California, or any state, might affect the procurement policies of the United States. For example, clothing or [fol. 185] other supplies at the present time might be purchased in Los Angeles. If the freight rates were raised appreciably it might be more economical for the Government to purchase such clothes in the State of Washington and have them shipped down by boat. Situations of this sort might be very unusual in a state like California but would be common indeed in a state like Pennsylvania or New York.

5. If intrastate rates for the transportation of property were appreciably increased in California and in other states, certainly serious consideration would have to be given to either relocating or changing the functions of the various depots in the depot system so that shipments between these installations would be in fact interstate and therefore not subject to the Commission regulation. Such a general re-

adjustment would, of course, be unfortunate in that it would be adventitious and would have no rational relation to the logistical and strategic purposes for which the system was designed and established. Most likely a relocation or redesigning of the depot system would bring about a curtailment of certain operations in California with resulting loss of employment and other economic benefits flowing from the operation of a large installation in a community.

6. In recent years certain trade associations and groups, for interests best known to themselves, have disseminated the idea that the Government, in making special arrangements in transportation, is forcing reduced rates on the carriers and thereby is indirectly increasing the burden on commercial shipments. Scientific statistical studies have been recently made to determine the validity of this thesis. [fol. 186] So far these studies reveal that the rate the Government pays is somewhat higher than the rate paid by the commercial shippers.[15] This is due to the fact that commercial shippers have a well engrained channel of traffic and can by negotiation with the carriers work out a commodity rate which is greatly lower than the class rate. The Government, on the other hand, due to the irregular pattern of its traffic, is unable to effect this type of arrangement with the carriers and must deal on an irregular and short term basis. Thus, from the nature of things its rates will be higher than the commodity, or going rates of commercial shippers. In any event as a matter of policy the officers of the Government are always re-

[15] Statements Nos. 5339 and 5237 of the Bureau of Transport Economics and Statistics of the Interstate Commerce Commission, *Transport Economics*, August 1955, page 10. This study shows that rates paid by the Government in 1950 and 1952 were 14% higher than comparable commodity rates. In 1953 the Government rates were approximately 13% greater. A more recent study shows that in 1954 the Government rates were approximately 13% greater. *Transport Economics*, December 1955, page 8. These studies were made by the statistical experts of the Interstate Commerce Commission. The Defense Department has made similar studies and has reached approximately the same conclusion. It must be stated that certain statisticians in the transportation field disagree with the statistical bases of these studies.

quired to negotiate a reasonable rate and assiduous effort is made to see to it that under the special arrangements made for the carriage of this property the carriers earn a fair return. It should likewise be borne in mind that the Government is one of the largest, if not the largest, shipper in the State of California. It seems reasonable to conclude that due to the volume of traffic generated by it within the state, the carriers are able to handle the business of commercial shippers at a more favorable rate.

[fol. 187] 7. The problem presented in this case is a general one. If the State of California can constitutionally regulate the rates for shipment of Government property, so can the other states. In fact, as previously stated, the states of Pennsylvania, Kentucky, Texas and Louisiana have already asserted jurisdiction.[16] If all the states did so, the cost of transporting materiel, which approximates one billion dollars a year, would be appreciably increased and another large item would be added to the defense budget for no apparently good reason. In the end this increase would have to be borne by the tax payers at large, including the tax payers of California. It seems that the only persons or concerns that would benefit by the increase would be a few carriers who for one reason or another were unable to compete for the traffic.

VI

Many Shipments, Which on the Surface Appear to be Intrastate, Are in Fact Interstate by Virtue of the Fact That They Are in the Stream or Current of Interstate Commerce or Are Shipped to or From Enclaves Over Which the United States Has Exclusive Jurisdiction. Any Effort to Apply Section 530 in Situations of This Sort Could Only Result in Confusion, Friction and Needless Litigation.

A. It is well recognized that since the Supreme Court's decision in *Stafford* v. *Wallace*, 258 U. S. 495, the concept of interstate commerce has been considerably broadened.

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[16] The states of Georgia and Michigan likewise seem to be on the point of asserting jurisdiction.

In that case the court recognized the fact that the stockyards of Chicago were simply a conduit through which the cattle from the ranges passed for distribution to the country at large, and therefore, for purposes of federal [fol. 188] regulation, they were commodities in interstate commerce although held stationary for a time within the State of Illinois. A very good statement of the modern concept of interstate commerce was made by Justice Minton while he was a Circuit Judge in *Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210, aff'd 340 U. S. 231. This case involved the question whether the Federal Trade Commission Act applied to gas and oil which was shipped from out of State into storage tanks in the State of Michigan and then distributed with regularity to various users within the State. In holding that, both while it was in the storage tanks and while it was being delivered to the ultimate users in the State, it was still in interstate commerce, the court reviewed the recent decisions and made the following pertinent observations (pp. 213-214):

> It is not disputed that the petitioner is engaged in commerce, but it is vigorously insisted that commerce ended at the River Rouge plant and the bulk plants in the Detroit Area and that the petitioner's transactions from there on were wholly intrastate. With this we are unable to agree. The break that occurred at River Rouge was a break in transportation but not in the constant stream of commerce . . . The stream of commerce flowed continuously from the tanks at the refinery to the tankers on the lake; from the tankers to the tanks at River Rouge and the bulk plants in Detroit; and from there into tank cars and tank trucks to the petitioner's customers . . . Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were [fol. 189] fairly constant, and the petitioner's customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting [in Indiana] to Detroit.
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We decline, as the Supreme Court did in Stafford v. Wallace, supra, 258 U.S. at page 519, 42 S. Ct. at page 403, 66 L. Ed. 735, 23 A.L.R. 229, " * * * to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities, when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." After all, as Justice Holmes said in Swift & Company v. United States, 196 U.S. 375, 398, 25 S. Ct. 276, 280, 49 L. Ed. 518, " * * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the Congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose. The late cases support the view that the petitioner's operations are in commerce from the refinery to its customers. Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 332, 87 L. Ed. 460; Binderup v. Pathe Exchange, 263 U. S. 291, 309, 44 S. Ct. 96, 68 L. Ed. 308; Mid-Continent [fol. 190] Petroleum Corporation v. Keen, 8 Cir., 157 F. 2d 310, 314; Republic Pictures Corporation v. Kappler, 8 Cir., 151 F. 2d 543, 545, 162 A.L.R. 228; Walling v. American Stores Co., 3 Cir. 133 F. 2d 840.

The general principles were applied comparatively recently in a situation analogous in many respects to the situation which would be presented if an effort was made to apply the sections in question in the instant case to shipments from the Sharpe General Depot or the Navy depot at Oakland, to some installation in California. in *Wycoff Co.* v. *Public Service Commission of Utah,* 195 F. 2d 252. In this case motion picture films were shipped into the State of Utah from New York, New Jersey and Los Angeles to an exchange maintained in Salt Lake City. This exchange would send the films out to various local theatres

in the state in accordance with requests. The Public Service Commission of Utah asserted jurisdiction over the common carriers who contracted to carry the films from Salt Lake City to the local theaters. In holding that the local distribution was still a part of the current of commerce and therefore without the jurisdiction of the State Commission, the court made the following pertinent statement (p. 254):[17]

> The legal principles which guide us in determining whether an intrastate shipment is in fact such or is a continuing part of an interstate shipment are clear [fol. 191] and well defined. The difficulty as always comes when we seek to apply them to a given state of facts. As stated by the Supreme Court in United States v. Erie R. Co., 280 U. S. 98, 50 S. Ct. 51, 53, 74 L.Ed. 187, "the nature of the shipment is not dependent upon the question when or to whom the title passes * * *" or whether "the transaction is initiated or completed under a local bill of lading which is wholly intrastate, * * *" nor yet "by the fact that there may be a detention before or after the shipment on the local bill of lading." If there is a continuing intent that the goods shall be transported until they reach a designated place, the entire transportation is a continuing one, notwithstanding that there may be a temporary stoppage enroute for a particular purpose. [See Atlantic Coast Line R. R. Co. v. Standard Oil Co., 275 U.S. 257, 48 S.Ct. 107, 72 L.Ed. 270; and United States v. Erie R. Co., 280 U.S. 98, 50 S. Ct. 51, 74 L.Ed. 187, and cases cited therein.] In Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S. Ct. 332, 335, 87 L. Ed. 460, the Supreme Court reaffirmed these principles in the following language: "If the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final des-

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[17] The case was reversed on rather technical grounds involving the construction of the Federal Declaratory Judgment Act as it applied to state statutes. In dissenting Mr. Justice Douglas made the undisputed observation that there was no question that the local transportation was interstate commerce. 344 U. S. 237.

tinations, they remain 'in commerce' until they reach those points."

There can be no question, to use the phrase of Justice Minton, that ammunition, tanks, jeeps, cannons, and all types of war materiel "surge through" Benicia Arsenal. Every week ammunition, tanks and jeeps come into the depot from many states and every week go out to various camps and installations in California and elsewhere. Simi- [fol. 192] larly, at McClelland Air Field propellers, engines, airplane parts "surge through" the installation and go out with great regularity to points in California, points in other states and overseas. In fact, it is certainly arguable that all shipments to and from these large depots, where materiel is intermingled in a common mass, are in interstate commerce until the final resting place and consumption, regardless whether or not that place may be in California. Certainly many particular shipments remain in the current of commerce until they are finally at rest in California.

B. Further, although Article 1, section 8, clause 3, of the Constitution expressly grants the Congress all the power "to regulate commerce with foreign nations, and among the several states, and with Indian Tribes," notwithstanding verbal difficulties, it has been held that commerce between a territory and a state is interstate commerce. *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; cf. *Inter-Island Steam Navigation Co.* v. *Hawaii*, 96 F. 2d 412, aff'd, 305 U. S. 306. Similarly, commerce between the District of Columbia and a state falls "within the domain of the great, distinct, substantive power (of Congress) to regulate commerce * * * ." *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147, 148; cf. *Galloway* v. *Bell*, 11 F. 2d 558 (56 App. D. C.); *United States* v. *Capital Transit Co.*, 325 U. S. 357. Tracts of land ceded by the states to the Federal Government have a constitutional status identical in all respects with that of the District. The Federal jurisdiction over both is derived from the same clause of the Constitution (United States Constitution, Article 1, section 8, clause 17). [fol. 193] See *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California, et al.*, 318 U. S. 285 (1943). As

stated by the Supreme Court of California in *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 19 Cal. (2) 818, 123 Pacific 2d 442, 447 (1942), reversed on other grounds, 318 U. S. 205:[18]

> The contention is nevertheless advanced that transactions between such federal areas as Moffett Field and the rest of the State do not come within the power of Congress to regulate interstate commerce, because such areas do not fall within the categories of States, foreign nations, or Indian tribes set forth in the commerce clause. The judicial interpretation of the commerce clause, however, has greatly amplified the meaning of interstate commerce. Thus, commerce between States and territories has long been recognized as interstate commerce. *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617, 23 S. Ct. 214, 47 L. Ed. 333; *Inter-Island Steam Navigation Co.* v. *Hawaii*, 9 Cir., 90 Fed. 2d 412, aff'd 305 U. S. 306, 59 S. Ct. 202, 83 L. Ed. 189. Commerce between States and the District of Columbia is similarly recognized as interstate commerce. *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 9 S. Ct. 256, 43 L. Ed. 637; *Galloway* v. *Bell*, 56 App. D. C. 172, 11 Fed. 2d 558. Such areas as Moffett Field are in the same category as the District of Columbia, for the same power of Congress extends over them both. U. S. Const. Art. 1, Sec. 80, cl. 17; *Surplus Trading Co.* [fol. 194] v. *Cook*, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264. In the light of the foregoing cases it is clear that the power of Congress to regulate interstate commerce, reinforced by its authority over territories and 'forts, magazines, arsenals, dockyards, and other needful buildings' [281 U. S. 647, 50 S. Ct. 456, 74 L. Ed. 1091] enables it to regulate commerce between States and such areas as Moffett Field.

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[18] See also Standard Oil Co. v. California, 291 U. S. 242; Arlington Hotel Co. v. Fant, 278 U. S. 439; Western Union Telegraph Co. v. Chiles, 214 U. S. 274; Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525; United States v. Unzeuta, 281 U. S. 138 (1930); Surplus Trading Co. v. Cook, 281 U. S. 647.

A number of the installation- in the State of California, particularly the older ones, are situated on land which has been ceded to the United States and are held under its exclusive jurisdiction. For example, Moffett Field, which was involved in the *Pacific Coast Dairy* case, *supra*, furnishes a clear illustration of such an installation. A shipment of airplane parts might be loaded on a truck from a warehouse in the center of the Navy Supply Depot at Oakland, thence driven in to Moffett Field and there unloaded and stored in the heart of the installation there. Similarly, a shipment might be made from the Marine Depot at San Francisco to Camp Pendleton, which is largely situated on land within the exclusive jurisdiction of the United States.[19] Whether such shipments would be considered by the Supreme Court as interstate or intrastate presents an interesting question which has not been definitively decided [fol. 195] It is true that the Court of Claims in *Hughes Transportation, Inc.* v. *United States*, 121 F. Supp. 212, seems to hold that such a shipment would be intrastate, but as will be pointed out later this decision is considered unsound and the court has completely reopened the case so that the opinion is no longer authoritative. Thus, to try to disentangle out of all the myriad shipments made by the Government the particular shipments which in fact are intrastate commerce under the theory of the cases would be almost impossible. The carriers and the contracting officers would have no firm basis on which to carry out their negotiations and arrangements without constant advice from lawyers in an esoteric field of the law. The confusion and uncertainty would be great indeed. In fact, as far as the statutes of California impose penalties on carriers and shippers for failure to comply with applicable provisions, a serious question would be raised as to whether or not the whole statutory scheme would not violate the

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[19] For the status of Camp Pendleton, see United States v. Fallbrook Public Utility Dist., 110 F. Supp. 767, at page 771. With respect to the question of whether or not the Commission would have jurisdiction over shipments to installations such as Moffett Field and Camp Pendleton, it would seem that the Commission itself would be bound in the first instance by the opinion of the Supreme Court of the State of California in the *Pacific Coast Dairy* case, *supra*.

due process of law clauses of the 14th Amendment by virtue of the inherent vagueness and uncertainty as applied to the particular situations.[20]

[fol. 196]

VII

Although For the Reasons Above Stated It Is Firmly Believed That any Provision in the Statutes of California Regulating Rates For the Shipment of Government Property Would Be Unconstitutional in the Absence of an Express Policy of Congress, It Is Further Felt That Congress, Pursuant to Its Constitutional Powers, Has Clearly Expressed the Policy That All Shipments For the Government Shall Be Made by Special Arrangements and That Therefore Section 530 as Amended Is Directly Contrary to This Declared Policy.

As previously stated, since the creation of the Federal Government and the establishment of the Armed Services,

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[20] It is elementary that a state cannot impose upon its citizens at the risk of penalty the duty of resolving intricate constitutional questions to determine whether or not their everyday activities fall within or without a statute. As stated in *Smith* v. *Cahoon*, 283 U. S. 553, at page 564:

> Either the statute imposed upon the appellant obligations to which the State had no constitutional authority to subject him or it failed to define such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes. Considered as severable, the statute prescribed for private carriers "no standard of conduct that it was possible to know." *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 221; *Collins* v. *Kentucky*, 234 U. S. 634, 638; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Weeds, Inc.* v. *United States*, 255 U. S. 109; *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. It is idle to say that one could take a statute of this sort, establishing requirements binding upon private and common carriers alike, and divide its terms so as to make a valid scheme applicable to private carriers. *The legislature could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the statutory provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord.* [Emphasis supplied.]

it has been the uniform practice to negotiate the rates to be charged the United States for the transportation of supplies and materiel. In 1887 this practice was expressly recognized by Congress in enacting the Interstate Commerce Act. Section 22 of the Act provided "That nothing in this act shall apply to the carriage, storage, or handling of the property free or at reduced rates for the United States." 24 Stat. 387. In substantially similar form, this provision has continued in the Act until the present day. It should be borne in mind that this exemption section in the Interstate Commerce Act confers no power or right upon either the Government or the carriers, but is a mere recognition of the fact that insofar as Government ship-
[fol. 197] ments are concerned, rate regulation is illogical and the common law doctrines furnish the only rational basis to govern such shipments. *I. C. C.* v *B&O Railroad*, 145 U. S. 263, 278; *Nashville C. & St. L. Ry.* v. *Tennessee*, 262 U. S. 318.

In the past, a number of different statutes have vested the power to make arrangements for transportation in various officers of the United States. For example, for many years the acts of Congress expressly delegated to the Secretary of War the power to make arrangements for transportation of army materiel. The Postmaster General was given authority to make arrangements for transportation of property for the Post Office Department, etc. In 1947 Congress consolidated the procurement functions of the armed services by enacting the Armed Services Procurement Act. Generally, this act requires advertising for bids in normal procurement by the services. However, Section 2, Paragraph (c), 41 U.S.C.A. § 151(c), provides that the appropriate officers can negotiate for services under circumstances where it is practically necessary. It is to this section that the military officers trace their power to make arrangements for transportation of materiel. In 1949 Congress took a further step to consolidate all the Government's procurement and proprietary functions and there was established the General Services Administration by the Federal Property Administrative Services Act of 1949, Public Law 1952, 81st Cong., 1st Sess., Sections 201 and 202, 63 Stat. at page 377. This statute was all-embracing and

provides that the General Services Administration is empowered generally to arrange for the transportation of Government property, but provided that the Secretary of Defense might exempt the Department of Defense from [fol. 198] the requirements of the statute. On October 2, 1954, the Secretary of Defense took action to exempt his department from the Act. 19 Fed. Reg. 1954. Thus, the present power of the officials of the United States to negotiate for rates is derived from these two interlocking statutes enacted in 1947 and 1949. Both of these statutes express the broad policy that in procuring property and services for the Government competition should be the touchstone. The statutes are general in their terms and empower the officers of the United States to make arrangements for all shipments of property. No distinction whatsoever is made under the terms of the Act between interstate and intrastate shipments. It should be borne in mind that in 1949 when Congress enacted the pertinent legislation, it did so against a background of nonregulations by the states in this area for almost a century. Obviously, the draftsmen of the statute would consider it useless and inappropriate to expressly state that the Act applied to intrastate shipments in the light of the long established usage and it is plain that the same need for secrecy, the same need for economy, and the same need for flexibility existed regardless of the geographic termini of any particular shipment. Thus, when these two statutes are examined and interpreted in the light of the long established practices and the policy underlying the exemption in Section 22 of the Interstate Commerce Act, the conclusion seems inevitable that Congress has exercised its power fully in expressing the policy governing the method of procuring transportation for Government property. It is elementary that insofar as the statutes of the State of California are inconsistent with an express policy of Congress of this type, they are inoperative.

[fol. 199] VIII

The Constitutional Principles and Observations Above Are in No Way Inconsistent With the Decisions of the Supreme Court in *Alabama* v. *King & Boozer*, and *Penn Dairies* v. *Milk Control Commission*.

As Mr. Justice Jackson stated in *United States* v. *Allegheny County supra*, one of the most difficult constitutional problems which confronted the constitutional convention of 1787 was the adjustment of the overlapping financial needs and conflicting areas of taxation between the federal and state governments. See 322 U. S. 174, at 176. It is self-evident that, if the federal system is to be maintained, both the national and state governments must be adequately financed. In recent years the federal establishment has expanded to such a degree that it holds vast amounts of property and carries on many operations which are proprietary in nature within the geographic boundaries of the several states. In a number of instances the states have very justly levied taxes on property and operations of the United States within its boundaries. There is a long line of cases, of which *Alabama* v. *King & Boozer*, 314 U. S. 1, is a cardinal example, which involved the Supreme Court's coping with state taxation of federal facilities and operations of various sorts within its boundaries. The principle is clear that the state should be allowed to tax some federal activities. The problem is purely a financial one. Of course this line of cases involving the state's right and power to tax federal activities has no relation whatsoever to a regulation prohibiting common carriers within the state from hauling Government property according to special arrangements. No monies whatsoever would go into the state [fol. 200] treasury by virtue of the enforcement of such a regulation. As stated previously, it would redound only to the benefit of a few special carriers who for one reason or another were unable to compete for the traffic.

It is clear that the Supreme Court's decision in the *Penn Dairies* v. *Milk Control Comm'n.*, 318 U. S. 261, has no direct application to the case at bar. This for the following reasons:

1. In the *Penn Dairies* case the Supreme Court sustained the Pennsylvania statutes regulating the sale of milk even though the sales were made to troops stationed on a military reservation. Of course the problem of the supplying of milk to the population has been one of primary importance for years. Milk, by virtue of its calcium and other chemical properties, is the most essential item of diet for growing children. Therefore, its sale and distribution has always been impressed with a high local public interest and the Department of Agriculture of the United States, the Congress of the United States and various state governments have enacted statutes and regulations designed to assure a steady supply of wholesome milk, particularly for the urban areas. The general design of the milk regulations is to build up a strong economic milk shed in close proximity to the urban centers. Due to the perishable quality of milk these regulations are highly complicated. They are unique in that they present the only incident in which the Supreme Court has held that a state can regulate the minimum price of a commodity. See *Nebia* v. *New York*, 291 U. S. 502. In the *Penn Dairies* decision it is apparent that this peculiar vital quality of milk is the inarticulate major premise of the majority opinion. It is forthrightly the basis of Mr. Justice Murphy's opinion. [fol. 201] It is clear that a decision sustaining a state statute relating to the distribution of milk which stands at the very center of any state public health program has no relation whatsoever to a regulation by the state curtailing the United States' rights and responsibilities to have materiel transported.

2. It should be borne in mind that in the *Penn Dairies* case the court was dealing with just one commodity, milk, which is nothing more than one item in the ration for the troops. Although, of course, this item of the ration is tremendously important from the standpoint of health, economically it involves only an infinitesimal fraction of the cost of maintaining and supplying the troops. When this small item of increased expense is balanced against the local interest in milk regulation, the local interest overbalances the impediment to the national function. The instant case is different altogether. It involves the entire

system of transporting and carrying supplies and materiel, both from the standpoint of expense and in many more important ways. When the effect on the whole supply function is weighed against the local interest which would be served by Commission regulation of the rates for Government shipments, it is clear that the scales fall heavily in another direction.

3. Of course, the *Penn Dairies* case stands for the general proposition that a mere increase in the expense or cost of operating the Federal Government will not alone render a statute or regulation bringing about such a result unconstitutional under the broad principles of *McCulloch* v. *Maryland*, 4 Wheat. 316. The United States in no way questions the soundness of this accepted principle. However, it should be borne in mind that under the milk regu- [fol. 202] lations the prices charged to all consumers, including the United States, were uniform. In the instant case, the application of Section 530, for the reasons heretofore pointed to, will bring about a situation in which the Government would, from the nature of things in many situations, pay higher rates than those paid by commercial shippers making comparable shipments. Thus, the application of the section would be discriminatory. It is certainly plain that there is a great distinction from a constitutional point of view between a statute requiring the United States to pay the uniform price for some commodity or service which it must acquire and a statute which imposes upon it the necessity of acquiring a service or commodity at a discriminatorily higher rate or price.

4. Further, it should be noted that the regulations involved in the *Penn Dairies* case did not run directly to the officers or agents of the United States. No penalties were imposed on such officers for failure to comply with the regulations. It is clear that this aspect of the case was considered very important, if not controlling, in the majority opinion of the Court. Thus, at page 270, Chief Justice Stone stated: "Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty." In the instant case,

the statutes of the State of California impose direct prohibitions and penalties of jail sentences and fines on both the carriers and shippers and the shippers' employees.[21] Thus, the statute directly and unequivocally abrogates the [fol. 203] freedom of contract of the officers of the United States in the discharge of one of their most essential constitutional responsibilities. It appears clear that this distinction alone renders the *Penn Dairies* decision inapplicable in the case at bar.

5. Lastly, it should be noted that the Pennsylvania Milk Regulations simply required the United States to pay a somewhat higher price for milk. This requirement would in no way interfere and burden the lines of supplies. It would not cause any delay in the procurement of milk or create additional administrative expense or necessitat the revelation of secret information. In short, any reflection inevitably leads to the conclusion that the decision in the *Penn Dairies* case has little or no application in the instant case.

IX

The Opinion of the United States Court of Claims in *Hughes Transportation, Inc.* v. *United States* Is Considered Unsound. The Case Has Now Been Reopened, Both With Respect to the Law and the Facts, and the Opinion Is No Longer Authoritative.

It must be admitted that the opinion of the Court of Claims in *Hughes Transportation, Inc.* v. *United States*, 121 F. Supp. 212, is inconsistent in every respect with the principles and considerations developed above. In considering this case, it should be borne in mind in the first place that the case arose on a motion for summary judgment and no opportunity was given to develop the facts bearing on the constitutional aspects of the matter. Accordingly, it is felt that the court without having the advantage of the full presentation of the facts fell into an error which resulted primarily from a misinterpretation and misapplica- [fol. 204] tion of the affirmance by the Supreme Court of

[21] Public Utilities Code of California, Sections 2110, 2112 and 2113.

the decision of the Supreme Court of Maryland in *Baltimore & Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734, 308 U. S. 525. In this case the Supreme Court of Maryland held that the general provisions of its statutes regulating motor carriers of passengers applied to an operator of busses between Baltimore and Annapolis over the highways of Maryland carrying W.P.A. workers to a Government project during the depression years. The Maryland statutes had the usual requirements with respect to insurance, inspection, and other regulations relating to safety. Of course, fees were involved designed to defray the expense of the maintenance of the state roads and highways. An appeal was taken from the decision of the Supreme Court of Maryland to the United States Supreme Court. The Supreme Court dismissed the appeal summarily as not involving a substantial federal question, 308 U. S. 525. In its memorandum doing so the court cited four cases, including the leading case of *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 117. The cases cited demonstrate that the rationale of the Supreme Court's view of the *Lichtenberg* case was that it related only to the safe use of the highways in Maryland, a subject matter which, of course, is of cardinal local concern. That this is the basis for the disposition of the *Lichtenberg* case was clearly brought out in the same term in which the appeal in the case was denied. Thus, in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, the court was concerned with the question of whether or not a New York statute designed to assure safe working conditions for construction workers applied to the construction of a post office on Federal property in New York City. In holding that the local safety regulation was valid even though it [fol. 205] applied to work on the exclusive property of the United States, the court stated at page 104:

> Such a safety requirement is akin to the safety provisions of Maryland law which in *Baltimore & Annapolis Railroad Co.* v. *Lichtenberg* were held applicable to trucks of an independent contractor transporting government employees under a contract with the United States.

For all of the reasons above stated it is perfectly plain that safety regulations and regulations designed to finance the maintenance of the Highways have no relation whatsoever to the prescription of rates.

After the decision in the *Hughes* case, the United States was prepared to petition for certiorari to the Supreme Court of the United States, but it was felt that such an appeal was inappropriate prior to a complete presentation of the facts to the Court of Claims and a reargument of the constitutional question raised by the facts. Therefore, the United States filed a motion to have the case reopened and reheard. On July 15, 1954, the Court of Claims entered an order reopening the case. This reopening is considered complete, both with respect to the facts and the law.

Conclusion

For all the reasons set forth above, it is respectfully submitted that insofar as the pertinent sections of the California Public Utilities Code prohibit carriers from carrying property for the United States at rates arrived at by contract between the carriers and the United States, such Sections are unconstitutional and void. As summed up by Mr. Justice Jackson in *United States* v. *Allegheny County, supra,* (p. 183):

> [fol. 206] Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls.

STANLEY N. BARNES,
Assistant Attorney General.

LLOYD H. BURKE,
United States Attorney.

JAMES E. KILDAY,
E. RIGGS MCCONNELL,
JOHN H. D. WIGGER,
Attorneys, Department of Justice,
Washington 25, D. C.

[fol. 207] APPENDIX A

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS, 126TH JUDICIAL DISTRICT

No. 102,513

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL., PLAINTIFFS,

v.

RAILROAD COMMISSION OF TEXAS ET AL., DEFENDANTS

Press Release

A fair construction of the Texas Statutes pertinent to the subject of this case, when construed in the light of existing Federal law, does not prohibit the Government of the United States, in the exercise of its constitutional functions, from negotiating for and securing rates on intrastate shipments different than those prescribed by the Railroad Commission.

To hold otherwise would, in my opinion, impede the federal functions of national security and force the United States Government to expend thousands of additional dollars annually which it is not now required to expend. Thus tremendous savings to taxpayers is the direct result of allowing the Federal Government to negotiate for intrastate rates on certain governmental shipments.

Judge Jack Roberts.

[fol. 208] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HERBERT K. HYDE—Filed Feb. 8, 1956

District of Columbia, to wit:

Herbert K. Hyde deposes and states: that he is Commissioner, Transportation and Public Utilities Service, General Services Administration, and in that capacity is in

charge of administering the transportation and traffic management program of General Services Administration under the Federal Property and Administrative Services Act of 1949, as amended (63 Stat. 337, *et seq.*).

That he has read the complaint of the United States filed in the United States District Court for the Northern District of California, Southern Division, in *United States of America* vs. *Public Utilities Commission of the State of California*, Civil Action No. 35101; that he is familiar with the matters therein stated and that the same are true and correct to the best of his knowledge, information and belief.

The transportation problems of General Services Administration, although not in direct parallel with those of the military departments, have much in common. One of the more important programs administered by General Services Administration is under the "Strategic and Critical Materials Stock Piling Act" (53 Stat. 811; 60 Stat. 596).

Under this program, GSA purchases, stores and otherwise handles stock piling of urgently needed materials which have been designated by the Secretaries of the Army and Navy. Vast quantities of materials, notably ores, have been and are being acquired for this essential program which is vital to the national defense. Not only transportation to initial point of storage is required but further transportation to the point of use, for rotation to prevent deterioration, and for such other proper purpose as are related to the program.

The Transportation and Public Utilities Service uses, for rate evaluation purposes, the same practices and principles as are used by the Commercial traffic manager. The approach by both to equitable and reasonable rates necessarily is similar, as each is based on the sound rate-making principles as laid down by the Interstate Commerce Commission, some of which are:

Value of article; nature of article, whether crude or finished, liquid or dry, etc.; risk in handling material; dis-
[fol. 209] tance of haul; bulk and weight of article; requirement of special facilities or extra services; volume of traffic and duration of movement; packing methods; rates

on similar articles moving under similar circumstances and conditions; quantity to be loaded on car or trucks, and unusual cost of service of carrier.

By nature of this program, which involves the development of new sources, providing for storage of commodities that normally move direct from mine or port importation to point of use, and similar factors, this traffic frequently must move against the grain of commercial traffic flow or at least outside of or beyond those channels. The exigencies and requirements of a preparedness program in many instances preclude the development of a standard traffic flow pattern.

Supply must be responsible to the strategic plans and demands, either present or future, due to existing world conditions and must be under constant supervision looking to the need for revision.

Accordingly, for the reasons set forth in the complaint herein and in the affidavit of Major General Paul F. Yount, it is necessary from the standpoint of General Services Administration that the flexibility and speed of rate-making which is inherent in leaving rate adjustments outside of regulatory procedures be retained rather than by the imposition of controls which are adapted to commercial type traffic. The delays inherent in use of rate-making procedures, the filing with and review of rates by regulatory commissions, including the possibility of prolonged proceedings, impose undesirable features which would inimical to the programs administered by General Services Administration. Not the least of these features would be increased costs to the Government at a time when every effort is being made to conserve expenditures.

/s/ Herbert K. Hyde
Commissioner
Transportation and Public Utilities Service
General Services Administration.

Dated at Washington, D. C.
February 6, 1956.

[fol. 210] I, C. E. Milford, a notary public in and for the District of Columbia, do hereby certify that the foregoing affidavit was subscribed and sworn to before me this 6 day of February, 1956 by Herbert K. Hyde, Commissioner of the Transportation and Public Utilities Service, General Services Administration.

/s/ C. E. Milford
Notary Public

(SEAL)

My Commission Expires: August 14, 1956.

Endorsed: Filed Feb. 8, 1956, C. W. Calbreath, Clerk.

[fol. 211] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF PAUL F. YOUNT—Filed Feb. 6, 1956

With the Army of the United States,
At Arlington, Virginia, *ss*:

Paul F. Yount, Major General, United States Army, deposes and states: That he is the Chief of Transportation, Department of the Army; that he graduated from the United States Military Academy in 1930, received a civil engineering degree from Cornell University in 1933 and graduated from the Engineer School at Fort Humphreys, Virginia, in 1934; that since 1940 he has been active in military transportation matters in the operation of military transportation facilities and the procurement of commercial transportation services; that in 1945, he was assigned to the Office of the Chief of Transportation in Washington, D.C., as chief of Commercial Traffic and Military Railway Services and in March 1946 he became Assistant Chief of Transportation; that in 1949 he assumed command of the New York Port of Embarkation and in August 1950, he was transferred to Far East Command Headquarters at Tokyo, Japan; that in June 1952, he was appointed Deputy Chief of Transportation in Washington, D.C., becoming Acting Chief of Transportation in April 1953 and has been Chief of Transportation since 1954.

That he has read the complaint of the United States filed in the United States District Court for the Northern District of California, Southern Division in *United States of America* v. *Public Utilities Commission of the State of California*, Civil Action No. 35101; that he is personally familiar with the matters therein stated, and that the same are true and correct to the best of his knowledge, information and belief.

The Army has for many years made shipments of military traffic within the State of California pursuant to negotiated agreements with the various kinds of carriers operating within that State. In the event the United States is prevented from continuing to negotiate freely with carriers for transportation services by reason of operation of Section 530 of the Public Utilities Code of the State of California, as amended by Assemtly Bill No. 2480, Stat. 1955, Ch. 1966, present transpor-ation procurement policies and [fol. 212] procedures will be completely disrupted with attendant confusion, delay and expense arising from efforts to apply to military traffic a rate structure established primarily to govern commercial traffic and designed to fit commercial traffic patterns. Action by the Commission under the provisions of Section 530 of the Public Utilities Code, as amended, which has been temporarily postponed by the Commission pursuant to the restraining order in Civil Action No. 35101, would disrupt the existing rate structure for Government traffic and would require the movement of such traffic under tariff rates and provisions which are unsuited for the unique requirements for military traffic.

The pattern of military traffic is irregular and does not follow the industrial traffic pattern. Nearly all military material coming from producing points goes into the depot system. These depots have the responsibility for receipt, storage and issue of supplies to stations and activities located within a limited geographical area comprising a number of states in the Continental United States, and, in some instances, in overseas areas through ports of embarkation. Many depots have also the responsibility of performing maintenance and repair of military material, renovation of ammunition, manufacture of components and

assembly into the end items. The wide scope of the depot missions quire often makes it impossible to determine whether material going into a depot will be consumed or utilized at that place of whether it will be distributed to other activities within the same state or other destinations outside the state but within the distribution area of the depot. The irregularity of the military traffic patterns is further complicated by the reassignment of missions and the dispersal and relocation of depots and other installations. In most instances the various items of supply in the depot system are commingled for purposes of storage and otherwise into an indistinguishable mass and as a practical matter it would be difficult and administratively impractical to apply the provisions of Section 530, as amended, to purely intrastate shipments particularly those entitled to transit privileges.

Because of the dissimilarity of military traffic patterns as compared with commercial traffic, the military traffic often cannot move on the published low commodity rates which are available to the industrial shipper for movements be- [fol. 213] tween established distribution and marketing centers. Therefore, in the event the provisions of Section 530, as amended, are put into effect and enforced, a substantial amount of military traffic would be class-rated, which would result in unrealistically high charges when compared with charges computed at normal commodity rates applicable to commercial traffic.

Expedition and felxibility in adjusting rates for military traffic is essential because tactical and strategic plans are under constant revision. Supply must be responsive to the military operations, and transportation rate procedures utilized to arrive at reasonable rates must remain flexible. The necessity of complying with the requirement of Commission approval of rates would severely curtail the essential flexibility in many situations where time is of the essence. Likewise, in certain situations, a requirement of Commission approval would necessitate the revealing of secret or confidential information at least to Commission personnel, and, in the event of a public hearing, the United States would be placed in the dilemma of revealing such information to the public at large, or abandoning an effort

of rate adjustment and shipping only at the class rates.

Rate negotiations conducted by the military departments meet the usual criteria for reasonableness, and to the best of my knowledge and information do not place a burden upon commercial shippers.

In order to prevent immediate and irreparable injury to the United States, it is submitted that an interlocutory injunction should be issued until such time as a final hearing can be held.

/s/ Paul F. Yount
Major General, U. S. Army.

I, James F. Hanley, the undersigned officer, do hereby certify that the foregoing instrument was subscribed and sworn to before me this 22nd day of December, 1955, by Paul F. Yount, Army Service Number 018022, who is known to me to be a member of the Armed Forces of the United States in active military service as a Major General, and I, the undersigned, do further certify that I am at the date of this certificate a commissioned officer of the grade, branch [fol. 214] of service, organization and official capacity stated below, in the active service of the Army of the United States.

/s/ James F. Hanley, A. S. N. 039591, Colonel, Judge Advocate General's Corps, Office of Chief of Transportation, Department of Army, Authorized to perform the functions of a Notary Public by Article 136, Uniform Code of Military Justice, and Derring's Civil Code (1949), sec. 1183.5.

Endorsed: Filed Feb. 6, 1956, C. W. Calbreath, Clerk.

[fol. 215] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN P. DOYLE—Filed February 6, 1956

With the United States Air Force
at Arlington, Virginia, ss.:

John P. Doyle, Major General, Department of the Air Force, deposes and states; That he is and has been Director

of Transportation, Headquarters, United States Air Force, Washington, D.C., since July, 1952.

That he has read the complaint of the United States filed in the United States District Court for the Northern District of California, Southern Division in *United States of America* v. *Public Utilities Commission of the State of California*, Civil Action No. 35101; that the matters therein stated are true and correct to the best of his information and belief.

The Air Force has made shipments of military traffic within the State of California pursuant to negotiated agreements with the various carriers operating within that State. In the event the United States is restrained from continuing to negotiate promptly with carriers for transportation services by reason of operation of Section 530 of the Public Utilities Code of the State of California, as amended by Assembly Bill No. 2480, Stat. 1955, Ch. 1966, present transportation procurement policies and procedures will be completely disrupted with attendant confusion, delay and expense arising from efforts to apply to military traffic a rate structure established to govern commercial traffic and designed to fit commercial traffic patterns. Action by the Commission under the provisions of Section 530 of the Public Utilities Code, as amended, which has been temporarily postponed by the Commission pursuant to the restraining order in Civil Action No. 35101, would disrupt the existing rate structure for Government traffic and would require the movement of such traffic under rates which were prescribed for application on commercial traffic, notwithstanding that military traffic patterns are inherently different. Consequently, due consideration has not been given to a minimum basis of rates for application on military traffic.

[fol. 216] The regularity of the military traffic patterns is complicated by the reassignment of missions, the dispersal and relocation of depots and other installations. In most instances the various items of supply in the depot system are commingled generally for purposes of storage and it would be time consuming and administratively impractical to apply the provisions of Section 530, as amended, to intrastate shipments.

Because of the dissimilarity of military traffic patterns as compared with commercial traffic, military traffic generally will not move on the presently published reduced rates which are available to the industrial shipper for movements between established distribution and marketing centers located in the vicinity of Air Force installations. Therefore, in the event the provisions of Section 530 as amended, are put into effect, a substantial amount of military traffic would be subjected to unreasonable rates until such time as the required rate procedure is completed and the minimum rate order is amended.

The time factor and flexibility in adjusting rates for military traffic is of the utmost importance because tactical and strategic plans fluctuate rapidly, and supply must be responsive to the military operations. Prior Commission approval in some cases would necessitate the revealing of confidential information at least to Commission personnel, and, in the event of a public hearing, the United States would be placed in the dilemma of revealing such information to the public at large, or abandoning an effort of rate adjustment.

Rate negotiations conducted by the Air Force meet the generally established criteria for reasonableness; and carriers who have indicated a willingness to negotiate rates on Air Force traffic are, by virtue of the instant legislative mandate, prevented from so doing. On the other hand, the Air Force is similarly restrained from negotiating and establishing contractual rate agreements which would be in the best interests of the United States.

[fol. 217] In order to prohibit undue delay in establishing rates via all carriers and injury to the United States, it is submitted that an interlocutory injunction should be issued until such time as a final hearing can be held.

/s/ John P. Doyle, Major General, USAF

I, John B. Abernathy, the undersigned officer, do hereby certify that the foregoing instrument was subscribed and sworn to before me this 30th day of December, 1955, by John P. Doyle, Air Force Serial Number 274A, who is known to me to be a member of the Armed Forces of the

United States in active military service as a Major General. And I, the undersigned, do further certify that I am at the date of this certificate a commissioned officer of the grade, branch of service, organization and official capacity stated below, in the active service of the United States Air Force.

/s/ John B. Abernathy, AO-914729, Major, USAF, Judge Advocate, Office of the Judge Advocate General, United States Air Force, Authorized to perform the functions of a Notary Public by Article 136, Uniform Code of Military Justice, and Deering's Civil Code (1949), sec. 1183.5.

Endorsed: Filed Feb. 6, 1956, C. W. Calbreath, Clerk.

[fol. 218] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civ. No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

ORDER DENYING MOTION TO DISMISS—February 17, 1956

The motion of defendant to dismiss the action having been briefed, argued and submitted,

It Is Hereby Ordered that said motion be, and the same is hereby denied.

Dated: February 17, 1956.

Dal M. Lemmon, Circuit Judge.
Oliver D. Hamlin, District Judge.
Oliver J. Carter, District Judge.

[fol. 219] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

ANSWER OF DEFENDANT—Filed February 27, 1956

I.

The defendant admits the allegations of paragraph I of the complaint.

II.

The defendant admits the allegation in paragraph II of the complaint that it is necessary "in many instances to transfer such supplies and materiel from one installation to another within the State of California," and denies the remaining allegations in paragraph II.

III.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph III.

[fol. 220] IV.

The defendant admits the allegation that the Legislature of the State of California "amended Section 530 of the Public Utilities Code," and denies the remaining allegations of paragraph IV.

V.

The defendant denies the allegations of paragraph V.

VI.

The defendant denies the allegations of paragraph VI.

VII.

The defendant denies the allegations of paragraph VII.

/s/ Everett C. McKeage, /s/ J. Thomason Phelps, /s/ William R. Roche.

[fol. 221] AFFIDAVIT OF SERVICE BY MAIL
(omitted in printing)

[fol. 222] [File endorsement omitted]

THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

No. 35101

Before: LEMMON, Circuit Judge, and OLIVER J. CARTER and HAMLIN, District Judges.

OPINION—April 30, 1956

LEMMON, Circuit Judge.

"To git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.

There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.

In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, *infra*, hereinafter referred to as "Sec. 530", is held to apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the intelligence agents of foreign powers and might [fol. 223] jeopardize the security of the United States."

At the trial, the plaintiff put on a parade of witnesses whom we have found to be impressive. Most of them were officers in the Department of Defense, one of them being a brigadier general of the Army. Those witnesses were most emphatic in declaring that the application of Sec. 530 to military freight shipments would be costly and time-consuming, and would have a "chaotic" effect upon the defense activities of the United States.

The defendant, on the other hand, both in its testimony and in a most solemn unilateral stipulation by its chief counsel, *infra*, insisted that it would apply Sec. 530 in a manner that would not impede the plaintiff's defense measures. We may point out in passing, however, that neither the defendant nor its learned chief counsel can bind their successors by even the most impressive testimony or the most solemn "stipulation". But we do not bottom our decision upon this ground.

We are convinced of the complete honesty and good faith of each party to this suit. We believe that the record contains not a single sentence of perjurious testimony. We think that each witness, in the language of the day, "called it as he saw it".

But the crucial question here presented can be resolved by neither the assurance of responsible defense witnesses nor counsel's formal avowal that the statute would be "reasonably" applied to the plaintiff's shipments and the interests of the United States would in no wise be injured. The problem before us is not one of *administrative discretion* but of *Constitutional* power:

May a State statute *empower* a State Commission, however patriotic and well-intentioned that Commission may [fol. 224] be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and SUBJECT to such conditions as IT may consider just and reasonable*"? [Emphasis supplied]

Reluctant as we are to declare invalid any part of a State statute, we are impelled to hold that, in so far as the plaintiff is concerned, that part of Section 530 which purports to limit the plaintiff's enjoyment of reduced freight rates according to the defendant's pleasure, is in contra-

vention to the Constitution of the United States, as placing an improper restriction upon the plaintiff in the exercise of its sovereign powers related to the national defense.

1. *Statement of the Case*

On December 2, 1955, the plaintiff filed a complaint in the above-entitled cause, to have this Court declare that certain sections of the California Public Utilities Code, *infra,* are unconstitutional, and to have the California Public Utilities Commission permanently enjoined from taking any action under those sections.

On the same day, Judge CARTER signed an order to show cause and a temporary restraining order, supported by a "Verification and Affidavit" by Captain F. L. Haerlin, USN, together with an order to show cause why an *interlocutory injunction* should not issue during the pendency of the action.

On December 22, 1955, a motion to dismiss the complaint was filed. That motion was denied on February 17, 1956, and by agreement the temporary restraining order was continued in effect in lieu of an interlocutory injunction.

On January 27, 1956, a large group of common carriers filed a motion to intervene as defendants. That motion was denied, "without prejudice to the right of the applicants in intervention to appear amicus curiae in further proceed-
[fol. 225] ings in this case."

On February 3, 1956, the California Manufacturers Association filed a motion to appear as amicus curiae. That motion was granted.

On February 6, 1956 Major Generals Paul F. Yount and John P. Doyle, of the United States Army and the Department of the Air Force, respectively, filed affidavits to the effect that the allegations of the complaint are true, to the best of their information and belief. They are the transportation heads of their respective branches of the armed forces.

The defendant filed its answer on February 27, 1956.

2. *The Complaint*

The plaintiff alleges that in July, 1955, the California Legislature amended Sec. 530 of the Public Utilities Code

and deleted therefrom "the express exemption from the general provisions of the Code of Shipments of property" of the plaintiff. California Stat. 1955, Ch. 1966. This amendment likewise expressly provided that carriers could grant reduced rates to the plaintiff only with the permission and under conditions determined by the defendant.

It is averred that in so far as Sec. 530 and related sections of the Public Utilities Code prohibit carriers from shipping property for the United States at rates different from those approved by the defendant, they are void under Article VI Sec. 2 of the Constitution of the United States, in that:

1. For no valid reason within the police powers or other reserved powers of the State, they place an unreasonable burden and impediment on the United States in the discharge of its Constitutional powers and responsibilities.

2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of Congress, under the Constitution.

3. They contravene the policy of Congress implicit in the Federal Property and Administrative Services Act of [fol. 226] 1949, relating to the negotiation for the transportation of property for the plaintiff, and enacted pursuant to the power conferred upon Congress by the Constitution.

4. Insofar as the Public Utilities Code of the State imposes penalties upon common carriers for failure to ship property for the plaintiff at rates other than those approved by the defendant, it is repugnant to Amendment XIV of the Constitution, in that it is vague and uncertain because it imposes upon carriers the duty of resolving intricate questions of law and fact in determining what particular shipments of persons or property may be in intrastate or in interstate commerce.

Wherefore it is prayed that, on final hearing, judgment be entered declaring that insofar as Section 530 "and related provisions prohibit carriers within the State from shipping property" of the plaintiff "at rates other than those approved by the defendant, it [sic] is unconstitutional and

void"; and that the defendant be permanently enjoined from making any effort to prohibit carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the plaintiff at rates and charges other than those determined by such contracts and arrangements between the plaintiff and the carriers.

3. *The Motion to Dismiss*

The motion to dismiss and its supporting brief set forth that:

1. The Court lacks jurisdiction over the subject matter of the complaint, because:

(a) The complaint does not allege an "actual controversy" within the meaning of 28 USCA Sec. 2201, and the plaintiff therefore is not entitled to a declaratory judgment.

(b) The plaintiff has failed to exhaust the administrative [fol. 227] remedy available to it in a proceeding before the defendant.

(c) The complaint involves a matter within the primary jurisdiction of the defendant as an administrative agency of the State.

(d) This Court is prohibited by the Johnson Act, 28 USCA Sec. 1342, from granting the relief requested by the plaintiff. The Johnson Act is as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> > "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
> > "(2) The order does not interfere with interstate commerce; and,
> > "(3) The order has been made after reasonable notice and hearings; and,
> > "(4) A plain, speedy and efficient remedy may be had in the courts of such State."

(e) The plaintiff will not suffer irreparable injury in the absence of injunctive relief by this Court, but has an adequate remedy elsewhere. On the contrary, persons other than the plaintiff have suffered, and will continue to suffer, irreparable injury as a result of this Court's granting the plaintiff's request for injunctive relief. " . . . the Commission, in compliance with this Court's restraining order, indefinitely suspended the cancellation of a provision in Minimum Rate Tariff No. 2, and thereby continued, for an indefinite period of time, the opportunity for some carriers to hold rates at a 'depressed and unreasonably low level'."

(f) The Court is required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the plaintiff and the State of California.

[fol. 228] (g) The subject matter of the complaint is within the exclusive jurisdiction of the State.

2. The complaint fails to state a claim upon which relief can be granted. In addition to the "deficiencies" already pointed out, there are additional defects: "Most of the allegations of the complaint are not well pleaded for one reason or another. They are either vague, or ambiguous, or conjectural, or irrelevant, or conclusions rather than specific allegations of fact. " . . . the only things left are allegations that the California Legislature amended Section 530 of the Public Utilities Code, and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. . . . [These two allegations] do not furnish any basis for relief by this Court."

4. *The Plaintiff's Position*

The plaintiff's brief was filed after that of the defendant, and is partly in answer thereto. Its main points are stated in its complaint, which is, to a certain extent, argumentative and contains considerable background material.

In addition, the brief asserts:

I. The Court has jurisdiction over this action, because the "gravamen of the plaintiff's case lies in its assertion

that from the nature of the rate regulating process any subjection of it to the process will directly and drastically interfere with its constitutional responsibilities, principally that of supplying the armed services."

II. The plaintiff's lines of supply are such that any local interference with them is a matter of national concern.

III. Any state statute that places an unreasonable burden or impediment on the discharge of a federal function is unconstitutional. The local interest involved must be balanced against the national interest with which the statute [fol. 229] interferes.

IV. The defendant's regulation of rates for carrying the plaintiff's property would seriously interfere with the lines of supply and place a great burden on the officers of the United States charged with responsibilities in the supply function.

V. The defendant's regulation of rates for carrying the plaintiff's property would not benefit the citizens of California in any way whatsoever. The contrary would be true.

VI. Many shipments that appear to be *intrastate* are in fact *interstate* because they are in the stream of interstate commerce or are shipped to or from places over which the plaintiff has exclusive jurisdiction. Any effort to apply Sec. 530 in such situations would result in confusion, friction, and needless litigation.

VII. Pursuant to its Constitutional powers, Congress has clearly expressed the policy that all shipments for the plaintiff shall be made by special arrangements, and Sec. 530 as amended is directly contrary to this policy.

5. *Section 530, as Amended*

On July 12, 1955, Sec. 530 of the Public Utilities Code of California was amended to read as follows:

> "Every common carrier . . . may transport, free or at reduced rates: (a) *Persons* for the United States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes . . .

> The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable*. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers*. . . ." [California Stat. 1955, c. 1966] [Emphasis supplied]

[fol. 230] Before the amendment, the first sentence of Sec. 530 read in pertinent part as follows:

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
> "Persons or Property for the United States," etc.

The deletion of the two emphasized words has given rise to the present controversy.

6. *The Testimony*

The first and principal witness for the plaintiff was Brigadier General Edmond C. R. Lasher, Assistant Chief of Transportation of the Army for Traffic, who represented the Department of Defense in his testimony. Although fourteen witnesses testified at the five-day trial, General Lasher's testimony, covering more than one hundred pages, takes up nearly one-fifth of the 552-page transcript.

General Lasher was an intelligent, forthright, and impressive witness. He told the Court that "The policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

"This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport

cannot meet the requirements of the particular traffic involved."

(a) *The "Pattern of Traffic"*

A trifoliate standard is observed by the plaintiff in choosing "the modes of transportation for the armed services," General Lasher explained:

> [fol. 231] "The first requirement, of course, in all our transportation is to select that carrier within that mode which best accomplishes the requirements of the particular traffic involved. The needs of the government are, of course, paramount. Secondarily, the question of cost is involved; and thirdly, the division of traffic amongst the carriers who are able to carry it."

There are "many, many points of difference between commercial requirements . . . and military requirements for transportation", and commodities in military traffic "are never in competition" with commodities in commercial traffic, the general said.

"As a matter of fact," he added, "oftentimes they are moving opposite to the flow of commercial or industrial traffic."

The "pattern of traffic" for the plaintiff generally "must follow the flow of requirements" and *cannot be fixed by State boundaries*, General Lasher emphasized.

(b) *Commodity versus Class Rates*

The Army transportation expert explained the rate-making procedures for the transportation of government matériel in the plaintiff's depot system.

"Our goods move generally on tariffs," General Lasher stated, "but as we find penalty class rates applying to our traffic, we ask the carriers to sit down and negotiate with us. That is done on a direct basis with the carriers under the provisions of . . . Section 22 of the Act to regulate interstate commerce.[1] The rate and arrangements finally

[1] The opening words of that lengthy section are: "Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States," etc. (49 USCA Sec. 22)

agreed upon, or finally proffered, I will say, by the carrier [fol. 232] *pr* carriers is a rate voluntarily given and a rate which, in most cases, we believe is a rate that carrier can move the traffic for and still make a profit on his business."

The outgrowth of *commodity* rates from *class* rates was then traced by the general.

"Well, it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement or oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

(c) *Spark Plugs, Doughnuts, and a Korean Bottleneck*

After describing at some length the "depot system" of the Army in particular and the Department of Defense in general, the military transportation expert illustrated the [fol. 233] need of speed in supplying the needs of the armed services, by graphically describing a "bottleneck" involving the lowly spark plug.

"There is no substitute for a part, for an item, if you don't have it," General Lasher said. "And I would like to stress the importance of making this system work.

"Among other of my duties I was transportation officer of the Eighth Army during the first year in Korea, and we had a lot of truck companies over there, a lot of trucks. The length of Korea was such that we had to use a great deal of transport, and particularly as we raced north to the Yalu River. • • •

"The sad part of it was that we had many trucks deadlined, out of commission for lack of parts; and [of] three of the ordinary items [of] which we were in shortest supply, one was spark plugs, one was spring leads, and one was sealed beam headlights—items which I knew were coming off the production [lines] in the United States like doughnuts. Spark plugs tumbling off! I could see them! *We couldn't get a spark plug.* Not because there weren't spark plugs available, but because the logistics system wasn't working for one reason or another.

"Nothing must be placed as an impediment to the complete flexibility and flow of movement of supplies to our troops in foreign theaters, whether it's in peace or in war."

(d) *"We Would Never Win the War!"*

In reply to a question regarding the effect that State regulation of rates for intrastate shipments of the plaintiff's matériel "would have on the supply lines and logistical system of the United States," General Lasher said:

> "If we were . . . forced to go to State regulatory bodies in order to arrange for the movement of our traffic and the rates upon which it moves, we would find ourselves in a time-consuming job of spreading before the public the requirements of the military.
> [fol. 234] "First of all, let me say that it is only until recently that I have had to take into consideration whether certain of our traffic was or was not interstate, and in attempting to prepare myself somewhat, I tried to read some law and I was—I found out that I was terribly confused, that it would be very difficult for me to distinguish in most cases, for we do not

know when an item starts out on its journey from the processor whether it is going to be consumed in North Dakota or Florida or Cambodia.

"Now, one of our difficulties right away would be for the clerks in our thousands of post camps, stations and bases throughout the United States, our clerks to determine whether this item was intra- or interstate. It apparently is a rather moot question at law, let alone at the administrative level of a clerk earning $3500 or $4000 a year.

"Now, then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way, *we would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible.*

"We haven't touched on the security yet, but security is of primary importance to us. . . . Were we to spread . . . the record of the characteristics of our freight before the public and the parties at interest, we would seriously jeopardize that security, and in some cases be in violation of the law."

(e) *The Security Problem*

Expatiating upon the security phase of the problem, General Lasher continued:

"There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The general added that State regulation of rates would tend to increase the freight bill of the Federal Government:

[fol. 235] "Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

In 1955, "a peacetime year, rather quiet year," the Department of Defense spent about a half billion dollars. In "a typical wartime year", the expenditure was "four to five billion dollars", the General stated.

If the various States regulated the rates for the intrastate shipment of military matériel, the Department of Defense would have "to increase our force many times, in my opinion", General Lasher declared.

"Maybe no. 48 times," he explained, "but we would have to be ready to concurrently handle with several of the State regulatory bodies concurrently at the same time. So that we would have to have a multiplicity of groups, if you will, so that they could be handling concurrently so as not to delay things any more than necessary."

Finally, the entire depot system of the plaintiff would probably have to be rearranged, General Lasher asserted.

"Our depots are now set, upon the present system, whereby we can with facility make arrangements according to it. If we have 48 different jurisdictions, the pattern of our traffic will necessarily change because of the 48 different ideas as to how our traffic should . . . flow, and depending upon the pattern which falls [flows?] out from those various jurisdictions, we would then have to adjust our logistics system to comply with the new circumstances rather than the circumstances with which we find ourselves confronted now."

(f) *The Power Is the Threat*

On cross-examination, General Lasher conceded that the defendant "or any other state commission, for that matter,

[fol. 236] would be most receptive to any representations we of the military might have before such hearings."

"But," he added, "the mere fact that we would have to make such representations is to me the crux of this. Again I go back to my original testimony wherein I stated that the mere fact that we have to spread the record with things which we might not want to spread the record with is inimical to our best interests."

Emphasizing that the plaintiff is "alarmed" not by the defendant's administration of the power given to it by Sec. 530, but by the *existence of the power itself*, the General testified:

> "However magnanimous the Commission itself might be, or at any one time, depending upon its makeup, or however uncompromising it may be, depending upon some other makeup, what we view with alarm is an obvious intent to further regulate our logistic system by regulating the traffic which moves for it."

The witness conceded that he had "no reason to think that the Commission will not act reasonably".

The plaintiff's transportation expert also conceded that, although the present system is "good", there have been some few "abuses" under Sec. 22. In enlarging upon this statement, General Lasher testified:

> "Individual carriers will at times, in order to capture traffic which they might otherwise not have, quote for the Government under the umbrella of Section 22, rates far below the going rate in order to get a small piece of business. This abuse is very difficult to eradicate. However, the number of carriers by any mode of transportation who resort to that practice are, in the total number of carriers involved, very, very few."

The General added that he would advocate one change in the Interstate Commerce Act; namely:

> "A wording . . . to allow of such administrative procedures as would prevent the abuses which I mentioned a while ago. I said we were constrained to accept a low rate. We are constrained to do so because if we do not, then in the opinion of some people

[fol. 237] we are squandering the taxpayer's money. We do not want to be placed in that position. Therefore, if administratively we could have the authority and the Comptroller General of the United States also had the mandate from Congress, we could so administer Sec. 22 as to prevent these very abuses."

(g) *The Problem of Segregation.*

Lieutenant Colonel George A. Hall, Chief of the Transportation Division of Sharpe General Depot at Lathrop, California, testified that the Depost was carrying 61,800 "line" items a few days before he appeared in court. That figure did not include items used in repair and maintenance, "nor the items themselves that are in maintenance, such as bulldozers and locomotives and that sort of thing". The Depot ships primarily to points in the West Coast, in the Sixth Army area, embracing eight Western States. The turnover at the Depot is approximately 15,000 tons per month at the present time, "in and out".

The transportation expert testified that the Depot has "interstate and intrastate matériel so commingled that we could not possibly segregate it". He added that if the defendant assumed jurisdiction over the regulation of rates on the shipment from Sharpe, it would "just be impossible at the present time" to determine what matériel was in fact interstate and what was intrastate, in so far as the regulations were concerned.

In addition to supplying the armed services, the Sharpe Depot stores strategic materials, and also serves "as a source of supply" in disaster relief.

"One normally thinks of the Army in connection with a military disaster," Colonel Hall said. "Actually, that is not entirely correct. Take the recent flood. We are prepared, ready to go to work in case of any *civilian* disaster. [fol. 238] "During the flood we shipped approximately 225 truckloads of either flood relief material or equipment to fight the flood. . . . At the present time . . . the sources of danger in the area are considered, number one, earthquake; second, fire; third, flood; fourth, enemy action. We are prepared to go on 24-hour duty in the event of any disaster."

Colonel Hall remarked that there are a number of movements which are so urgent and to such out-of-the-places that there is no appropriate rate structure for them.

(h) *A "Completely Chaotic" Situation*

Replying to a question regarding what would happen at Sharpe if the restraining order in this case, *supra*, were lifted, "and the statute as you understand it went into effect", Colonel Hall testified:

> "Well, I can't imagine operating under such circumstances. *The situation in my office would be* COMPLETELY CHAOTIC! * * * We would have a lot of additional rating to do other than the physical handling, as I see it. I only have one rate clerk in my office, who is rating comparatively few shipments now. As I see it, he would be rating a good many under the circumstances described. * * * If we did try to consolidate it all, we would have to try to consolidate according to the freight classification rather than the present broad description that we are now able to operate under. . . . It would be a considerable burden upon my office. I would guess that it would increase our costs of billing—I am talking of the billing alone, the accomplishment of the paper work—some 40 per cent. It costs us $1.71 at Sharpe to issue each bill of lading. That is just the paper work of having a bill of lading prepared. The more complicated it becomes and the more bills of lading . . . that we issue, obviously that cost is going to go up. Of course, it would result in additional costs out on the shipping floor. * * * the increase in paper work would go all the way up the line. There are more pieces of paper, more bills of lading, more shipping documents, and all the way up to finance and general accounting office, there would be additional paper work as a result."

Another difficulty would arise in the negotiation of rates, Colonel Hall stated.

> [fol. 239] "I do not know just how it is contemplated that we will negotiate for rates. When I say 'we' I

mean the Department of the Army as a whole, how we would negotiate for rates. I would assume that it would require a series of officers in various localities to appear before the various state regulatory bodies. Of course, it would seem to me that they would impose a considerable burden upon the installations themselves asking for supporting data and testimony. I am not very well equipped at my place. We are strictly an operations office, not a statistical office, and I could not spare the time at the moment for too much of that."

(i) *The Spy's Jigsaw Puzzle*

On the subject of required secrecy in certain cases, Colonel Hall stated that "really over a period of time *every military shipment is in a sense a security shipment.*"

"I had some experience in Europe in that situation," the Lieutenant Colonel explained: "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments—shoes, medical supplies and food. Actually, a month's record of shipments to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purposes in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

On cross-examination, the transportation expert said that he did not know whether the defendant would require the publication of all the records of carriers transporting secret Government material.

"They *could*, under the circumstances, I would say," the [fol. 240] officer remarked.

Regulation by the defendant as contemplated by the statute in question would interfere in certain Governmental shipments to the following extent, Colonel Hall testified:

". . . now the office of Chief of Transportation can go direct to a competent carrier, or group of carriers, and explain the situation and whatever dealings are made are done very rapidly and easily, direct with the carriers. As I see it, in such a case as this, we would be going through the State Commission and we would not, in such case, necessarily deal directly with the carrier."

Lieutenant Colonel Andrew Paul Flanagan, Transportation Corps, Regular Army, stationed at Washington, D.C., testified that he is "charged with the responsibility for negotiating rates with commercial carriers, nationwide, for the movement of Department of Army freight". He stated that the regulation of rates by State Commissions for the movement of Government properties would interfere and impede him in the discharge of his responsibilities. "If this situation should spread to other States," he continued, "we would be faced, in my opinion, with an intolerable situation. We would be deprived of the flexibility and the expeditious methods we now have of establishing rates on army military traffic."

(j) *"The Need to Know"*

Colonel Flanagan discussed the "need-to-know" basis of security information, the principle of which had already been explained by General Lasher.

"In the case of where the carrier has a representative with a carrier's security clearance, I will tell that individual, not everything about the shipment, but all that he needs to know. We must realize that this classification, if a man is cleared for top secret, you do not have to tell him everything. It is on a need-to-know basis. You tell him only what he needs to know. I tell him sufficient information about that [fol. 241] traffic so he knows that what we are asking for is just and reasonable, and he is satisfied, and this is the only man that I have to convince—no one else."

Giving only "the skeleton facts" of a certain secret movement, *which was still taking place at the time he was*

testifying, Colonel Flanagan told how his office and the carrier established a rate that represented a saving of about $500,000 as compared with the "class rate".

> "We would have been faced on this movement [with] classification by analogy, which would have thrown us into a very high class-rate structure. There are also certain arrangements to be made—emergency arrangements and airplane—[we?] discuss this matter with the freight traffic manager of the carrier concerned.
>
> "Incidentally, he did not know anything outside the origin and destination. He didn't know what the actual commodity was and I couldn't tell him what the actual commodity was.
>
> "The shipment is moving in substantial volume, trainload lots. The difference between the two rates, you might say, the class rate structure and the rate we established, which incidentally gave the carrier a revenue of over $2.00 a car a mile on the rate we did establish, *was approximately a half a million dollars on that move.*"

The Colonel also testified regarding a similar saving of $73,000 on a small-arms and ammunition shipment from Belmont, Arizona, to an air field in Utah.

(k) *Wasting Time by the Truckload*

Lieutenant Commander Gordon W. Bengtson, Supply Corps, United States Navy, is in charge of the Navy Central Freight Control Office at the Naval Supply Center, at Oakland, California, which carries "hundreds of thousands" of items.

Commander Bengtson thus enumerated the various burdens that the application of Sec. 530, as amended, would place upon his office:

> "We would be required to ship under the rates established under the PUC minimum. . . . We would be required to classify every item in the shipment. . . . A shipping activity went through the process of completely classifying a shipment, a 40,000 pound truck-

[fol. 242] load shipment, and approximately 13 hours were expended, 13 man hours were expended in complete classification of all the items in this truckload shipment."

The naval officer expressed the opinion that a delay of that sort might be crucial for operational purposes in the Navy. He said:

> "If we were required to meet a deadline to ship material to ships operating where it would be required we ship on very short notice, those additional hours required to completely classify the shipment might result in a delay in meeting that deadline."

Commander Bengtson commented that such a delay might result in the ship's leaving port without the item on board, or, if the item was important enough, it might result in the ship's not sailing.

If "this new rate structure" went into effect, the personnel in his organization would have to be increased "approximately 50 per cent", Commender Bengtson said. The 13 additional hours required to classify completely the shipment "represents labor costs, and the 13 additional man hours would be approximately $25 a truckload." Bills that his office has already studied, "just through our main channels of traffic, reflect increases [in rates] up to 45 per cent".

Under Navy regulations, the nature, the direction, weight, etc., of shipments of security material for purposes of rate-making could not be revealed, Commander Bengtson said.

On cross-examination, the commander testified that "Where there is any doubt as to the interstate or intrastate nature of a shipment, we utilize carriers that have both operating rights, interstate and intrastate."

(b) *Speed Is of the Essence*

Colonel Herbert C. Chambers, commanding officer of the Air Force district traffic office at Mira Loma, California—an "office . . . composed of technicians"—expressed the view that State regulation of intrastate shipments of

[fol. 243] Air Force material between points in California would "definitely" interfere with his mission at Mira Loma.

"I say 'definitely'," he explained, "because we—our logistics system is based on *speed* and we cannot tolerate anything that would interfere with speed. And, as I have pointed out previously, this Air Force mission is worldwide, and I think every one recognizes the importance that Strategic Air Command has played in present world affairs."

Referring to "security-type shipments", Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers [number ?] of missiles that are involved or the points of origin and destination. We would certainly not . . . want to do it, and we would conceal that in so far as possible."

(m) *"Would Hamper and Hinder"*

Lieutenant Colonel Walter H. Eastham, United States Marine Corps, officer in charge, Marine Corps Fleet Control Office, San Francisco, California, testified that the imposition of the minimum rate classification—the defendant's regulation of rates—would severely hamper and hinder him in carrying out his duties.

"To begin with," he asserted, "it would require a slowdown in our movement of freight. It would cause . . . that the classification would be required. Since our traffic is very unique and different, we have to ship many thousands of different items and in many different directions, and itemwise our IBM stock records indicate that we have approximately 450,000 items in our stock system, control system, that is used to ship to the various activities.

" . . . the commodities are very difficult to be continually classified under one group . . . , they are all different, there is an admixture. If we have an emergency ship-[fol. 244] ment it would require us to pay, in my opinion, a higher charge, and all in all I just think it would cause us considerable inconvenience all the way through."

Colonel Eastham added that the defendant's regulation of rates for the shipment of Marine corps materiel would increase that service's "freight bill", and that such State regulation would "definitely" interfere with the shipments

of secret material "in so far as the classification of equipment, or a requirement for going before the Commission and explaining the type of equipment" is concerned.

There would be difficulty in distinguishing between interstate and intrastate materiel, the Marine Corps officer added.

"However," he continued, "it is our policy that where there is any question as to whether it is interstate or intrastate, we attempt to get carriers that have both rights, even though the charge is greater."

(n) *A Civilian Expert's Viewpoint*

So far we have considered the testimony of official spokesmen representing the Army, the Navy, the Air Force, and the Marine Corps. It may be helpful now to examine the viewpoint of a representative of the Western railroads, who expedites the handling of freight rate matters for the plaintiff.

We refer to Leonard Hill, of Washington, D.C., who testified that he has been employed "in various capacities by the western railroads for the past 39 years, and [that] most of those years were spent in handling the matter of freight rates for commercial shippers and for the Government."

Mr. Hill agreed with other Government witnesses that "the regulation of rates for the shipment of Government property by State Commissions" would seriously interfere with the plaintiff in the discharge of its responsibili- [fol. 245] ties of supplying the armed services. He also expressed the view that the present system of rate adjustment for the plaintiff is a good one.

"And I would like to add this, if it please the Court", Mr. Hill continued. "The railroads of the United States have had a good deal of experience in the handling of Government freight, and it's a matter of record during World War II 97 percent of the military traffic of the United States moved by rail.

"The present system is based on experience with it, and it fits the needs of the traffic and the needs of the traffic are directly involved with the national defense."

Several other witnesses, both military and civilian, testified on behalf of the plaintiff, but we believe that the individuals quoted above supplied evidence that amply supported the Government position.

(o) *The Case for the Defendant*

The first of the defendant's three witnesses was Tal Loretz, a self-employed traffic and transportation consultant, familiar "in a general way" with transportation rates in California.

Mr. Loretz testified that there was "need for some interdependence and some type of regulation, if you please, on Government traffic, because it is only a part of the overall traffic movement."

The witness explained that the freight-all-kinds ("f.a.k.") rates in California "have been generally subject to a 20,000 pound load that would be subject to one level of rate, a 30,000 pound load or shipment would be subject to a somewhat lower basis, and either a 36,000 or 40,000 pound load or shipment, which is normally the highest for a truckload movement, is accorded a still lower rate."

Much of Mr. Loretz's testimony was highly technical, [fol. 246] being given in part in connection with exhibits showing freight rates and their adjustments in California since 1952.

(p) *"Throwing the Book Out the Window"*

Mr. Loretz expressed himself as opposed to "f.a.k." "as applied to various kinds of moves".

"When you establish a freight-all-kinds rate, you in effect throw the book out the window," he declared. "You say that regardless of whether it's a steel billet or steel bar, on the one hand, or it's a mattress or an airplane wing or something, on the other, that we move them both at the same rate. . . .

"So the carriers have attempted at different times to set up some protection to themselves whereby, whether it be a steel beam or a mattress, why, they could be assured of a certain amount of minimum revenue per loaded mile.

"That is one phase. I have dwelt on that at some length because that is one phase of the deterioration of the California Government-rate structure which cannot be expressed just in figures. . . . my opinion is that the same rate applicable to the steel beam and the bulky airplane wing is, on its face, *wrong*."

It is this inequity, Mr. Loretz continued, that makes it necessary "that there should be some regulatory agency which could determine if and when there may be some special conditions to justify freight-all-kinds rates, and if there is any reason for them, to tie them down appropriately so as to avoid a burden being placed on other traffic which the carrier has to move, not only for the Government but for the public at large." He added that the f.a.k. rate has been abused in California.

"I can conceive from the military standpoint," Mr. Loretz explained, "we will say, if an entire division is being [fol. 247] moved from one location to another, it might be expedient for both the shipper and the military, as well as the carrier, to just have one rate on military impedimenta, and to take the good with the bad and average it out, so to speak, as any contractor might do in any other field.

"But I would like to point out particularly that your freight-all-kinds rate, as they [sic] have been in effect in California for the past several years, they go 'way beyond that purpose. *They apply on the whole load of steel bars or they apply on a load of mattresses.*

"It isn't a question of balancing your load between the two and avoiding a minute description of the entire shipment. It's a question of a rate which, if it's a good rate for one, it is obviously a bad rate for the other article, all of which is included within that broad description."

(q) *"Only an Impartial Regulatory Body Can Resolve It."*

By way of summary of this part of his testimony, the traffic expert asserted that freight-all-kinds rates "certainly should be scrutinized most carefully, and I don't know of any one other than an impartial regulatory body that can resolve the problems that have developed here in

California through the use and abuse of freight-all-kinds rates."

On cross-examination, Mr. Loretz was asked whether, "in controversial cases, . . . where the normal channels of due process were followed, . . . it would be possible to get a decision out of the [defendant] in less than 30 days". He replied:

> "As to commercial traffic, I would say that 30 days is probably pretty conservative. As to what the Commission might do on military traffic, as you have stated, if there are unusual conditions there, I couldn't say. I am sure they will find the means of meeting that situation, though.
>
> "Q. But so far as you know now, no such rules have been promulgated or proposed?
>
> [fol. 248] "A. There are none in effect on commercial traffic."

And on that muted note, Mr. Loretz's testimony ended.

Robert A. Lane, senior rate expert in the defendant's Transportation Department, was the next witness. Much of his testimony was in connection with a three-page typewritten document prepared under his direction by J.P. Haynes, Publishing Agent for all rails in California, and entitled "Pacific South Coast Freight Bureau Tariff No. 300, Cal. P.U.C. No. 102", etc. The exhibit was designed to show commodity rates between principal California shipping points, and covered items ranging from cable to canned goods, and from soap to sinks. Even at that, however, Mr. Lane testified that "these are a very, very small portion of the commodity rates in California. There are literally thousands of them."

Soap is a "heavy-moving commodity", Mr. Lane believed, and he included it in his list also because "certainly it is a commodity the military uses, and I wanted to show that we have commodity rates for commercial business for a general commodity such as that."

"One of the further purposes of this exhibit," Mr. Lane testified, is to combat the alleged inference that "there were no commodity rates in California available for the movement of traffic."

"The class rates, yes, they move c.l. traffic and carload traffic," Mr. Lane conceded, "but I think volumewise the class rates move only about a third of the traffic weightwise."

(r) *The "Piggyback" Plan*

The witness told of the "piggyback" system—"a movement of the rail traffic in a trailer, an automotive vehicle trailer of a subsidiary of the rail carrier."

"The vehicle body, the trailer," he explained, "picks up [fol. 249] the shipment, is loaded in there with use generally of the driver, and it is hauled to a rail yard where it is loaded on a flat car. . . . The trailers on flat cars are hauled over the rail lines to the terminal area, and in the terminal area they are unloaded and delivery is made from the trailer."

Mr. Lane stated that under California law motor vehicle carriers are at liberty to charge the rates that appeared in the rail tariff shown in his exhibit.

James W. Mulgrew, Director of the Transportation Division of the defendant, was the final witness. After reviewing the history of regulation of transportation in California since 1911, Mr. Mulgrew stated that for many years certificated carriers in California had the "unqualified right" to charge reduced rates for the plaintiff. This applied to "fixed terminal carriers and to the railroads," but not to "the highway contract or radial highway common carriers, who had no such right."

The defendant's transportation chief stated that he knew of no reason why commodity rates for the movement of Government traffic could not be granted "with the proper showing". He added that he saw "no reason" why regulation by the defendant "should necessarily cause delays".

(s) *"Rates Could Be Made Effective Retroactively"*

"In view particularly of the fact that there is no competition that I know of between the Government and individual shippers at all likely, I should think that the rates could be made effective retroactively much as they are done—much as they are made under the present system. . . .

"Now, the second point that I have, on delays, is the difficulty of classification of commodities where large numbers of different items are included in a lot. If I followed the testimony of the Government witnesses correctly, it [fol. 250] seems to me that that rests on a misconception. It's not necessary under our system of rates that the particular freight for a particular truck be segregated and rated as one shipment. You can make the tender of the entire lot, whether it be one truckload, ten truckloads, or a hundred truckloads, as one shipment, and the lowest truckload rates will apply to the entire string of trucks, regardless of how the category may be stowed in particular trucks.

"So . . . if I followed the testimony correctly, I don't see that there should be any delay attributable to rating, . . ."

On the subject of security, Mr. Mulgrew testified that the only thing that he could see to do "is to exempt that by some sort of a general order of the Commission, exempting the traffic from minimum rates or any sort of rate establishment upon certification by a competent military authority that this is restricted traffic, or secret traffic." He added that he would be prepared to recommend that sort of an order to the defendant.

(t) *Unregulated Rate Making "Creates the Opportunity for Abuses"*

Mr. Mulgrew testified that letting carriers be free to quote rates to the plaintiff "creates the opportunity for abuses that would not be present if there were some *screening*, shall we say, of the Government rates." The witness referred to General Lasher's reference to that as an "abuse", and added:

> "The danger, as I see it, is that * * * if rates get below cost, any rates, Governmental rates or commercial rates, the carriers can't long survive, or they will have to offset the unremunerative traffic with higher than necessary rates on other traffic.
>
> "There is a situation here, I think it is peculiar to California, where the carrier making the contract with

the shipper in turn hires some other carrier to do the actual hauling. That transaction between the two [fol. 251] carriers is not regulated ratewise except in the case of dump truck traffic, and so these carriers, called independent subcontractor haulers, may take freight at less than remunerative rates in order, as one witness said, to get 'gas money'. . . . There are some 15,000 of these permit carriers, many of them driver-owner operators."

The witness added that Sec. 530, as amended, does not require public hearings, and that it will be possible for the defendant to set up certain procedures for expediting requests by carriers or by the plaintiff itself with respect to the plaintiff's traffic.

"We have emergency situations that arise in commercial traffic and they are taken care of," Mr. Mulgrew commented.

On cross-examination, counsel for the plaintiff read from the defendant's "excellent report for the year 1954-1955" showing that the trucking industry for that fiscal year had a gross revenue of $550,730,134, "an all-time high".

Regardless of what might be happening in particular instances in the Government traffic, Mr. Mulgrew agreed that the trucking industry in California "as a whole is one that is sound," adding:

> "I think we have a very adequate transportation system and in reasonably good financial health."

Counsel for the plaintiff introduced the defendant's report, saying:

> "In a Constitutional question of this sort we balance the needs of the State regulation and balance against that the harm that would actually be done to the Federal Government in the carrying on of its Constitutional responsibilities on a national scale, and for that reason it seems to be very pertinent to know whether the situation here in California as a whole demands any drastic action at this time."

Of the 15,500 trucking companies in California that are authorized to carry Government traffic, about 500 are certificated—"common carriers in the sense that they must

serve all who tender them traffic within the limit of their common carrier undertaking", Mr. Mulgrew stated.

[fol. 252] (u) *Defense Counsel Stipulates*

Immediately before both parties rested, Judge Everett C. McKeage, chief counsel for the defendant, made the following unilateral stipulation:

> "I will stipulate that I will officially advise the Public Utilities Commission that it has lawful authority pursuant to Sec. 530 . . . and other provisions of [the Public Utilities] Code, to authorize any carrier to negotiate with the United States with complete freedom concerning the transportation of any property of the United States which may involve security matters, provided only that the carrier require a certificate from a responsible Federal official, which certificate shall be filed with the Commission, that such transportation involves security matters; and in my opinion, such advice will be accepted by the Commission and acted upon.
>
> "I further stipulate that I will officially advise the . . . Commission that it has authority pursuant to Sec. 530 . . . and other provisions of said Code to grant any and all lawful authority requested under said section of said Code without the necessity of a public hearing, and grant such authority effective immediately, and that such advice will be accepted and acted upon."

Judge McKeage then cited some law to the effect that the Commission "may make its orders effective immediately," and repeated that he would so advise the defendant, "and in my opinion they will accept and act upon" such advice.

7. *This Court Has Jurisdiction Over the Subject Matter of the Complaint.*

In a 54-page brief, with voluminous appendixes, the defendant argues that this Court should sustain the motion to dismiss. It would unduly lengthen an already lengthy opinion to discuss in detail the defendant's many contentions, some of which overlap. We have carefully considered each point, and will review the principal ones briefly.

The first major attack upon the complaint is that it fails to show that this Court has jurisdiction over its subject matter. Seven separate grounds are set forth for this contention. We will glance at each.

[fol. 253] (a) *The Complaint Describes an "Actual Controversy".*

The defendant asserts that the complaint "does not allege an 'actual controversy' within the meaning of [28 USCA Sec. 2201], and the plaintiff therefore is not entitled to a declaratory judgment". We have already fully summarized the complaint and the evidence adduced in its support: no unbiased reader of the record can fail to see that a real and pressing controversy does exist between the parties. We have also set out the salient provisions of Sec. 530. Sections 2110-2112 provide fines and imprisonment for violations of the Public Utilities Act. If a United States officer were to negotiate with a carrier for "reduced rates" without permitting the defendant to determine whether it "considered" the conditions of the contract "just and reasonable", he could be thrown into the county jail. He at least would speedily be convinced that there existed a "controversy" between his Government and the State of California!

The defendant cites Public Service Commission of Utah v. Wycoff Co., 1952, 344 U.S. 237, and Public Utilities Commission of California v. United Air Lines, 1953, 346 U.S. 402. We believe that neither case is in point. In *Wycoff*, the plaintiff sought a declaratory judgment that its carriage of motion picture film and newsreels between points in Utah constituted *interstate* commerce, and that the Public Service Commission of Utah should be forever enjoined from interfering with such transportation over routes authorized by the Interstate Commerce Commission. *The plaintiff specifically disavowed any attack upon the constitutionality of any Utah statute or the validity of any order of the State Commission.* 344 U.S. at pages 239-240. The Supreme Court held that the suit could not be maintained. In *United Air Lines*, the controversy centered around the question of whether air transportation between

[fol. 254] Santa Catalina Island and the mainland of California was subject to the jurisdiction of the present defendant or to the Civil Aeronautics Board of the United States. A three-judge District Court held that the United Air Lines, Inc., was entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff air line. There, again, there was no question of the constitutionality of a State statute. The Supreme Court reversed, on the authority of *Wycoff*. Neither case aids the present defendant.

(b) *The Plaintiff Was Not Obliged to "Exhaust" Any "Administrative Remedy" By Instituting a Proceeding Before the Defendant.*

In the instant suit, the plaintiff does not question the propriety of an act of the defendant, but asserts that Sec. 530 is unconstitutional in so far as it purports to authorize the defendant to regulate the rates for the carriage of the plaintiff's goods. The defendant contends that "the plaintiff has failed to exhaust the administrative remedy available to it," and cites six Supreme Court cases as supporting that statement. We have examined each of those six decisions, and find that *not one dealt with the constitutionality of a State statute.*

On the contrary, in Panitz v. District of Columbia, CA, D.C., 1940, 112 F. 2d 39, 41, Associate Justice Vinson of the Court of Appeals for the District of Columbia, and later Chief Justice of the United States, cautioned against permitting administrative agencies to pass upon the constitutionality of statutes. The learned jurist said:

> "Did the assessor, as an administrative official, have inherent power to rule on constitutional objections to the tax? It has been said that the necessities of our system require the *judiciary* to determine the constitutionality of Acts of the legislature. There can be [fol. 255] little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise. Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary *but argues as*

well against its exercise by other agencies. It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize *in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution.* Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate. Likewise, it has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions where no provision has been made therefor. In respect to taxation it is frequently stated that one need not pursue his administrative remedy where the tax is void. *Here again is apparent a reluctance to invest non-judicial agencies with jurisdiction to rule on the validity of statutes.*" [Emphasis supplied]

(c) *The Complaint Is Not Bottomed Upon a Ground That Is Within the Primary Jurisdiction of the Defendant as an Administrative Agency.*

The defendant claims "primary jurisdiction" in this case on the ground that the complaint recites that "Since time would be of the essence, it would be impossible to obtain Commission approval of rates and, accordingly, shipments by the United States would be thrown into the class rate, which as applied to such shipments is recognized as unrealistically high," etc. From this recital the defendant seeks to spell out jurisdiction for itself, because "this allegation calls for a determination of whether or not 'class rates' covering such shipments are 'unrealistically high' because of certain alleged peculiar characteristics of such shipments". It is therefore argued that such decision "calls for the exercise of an informed administrative judgment".

The defendant here overlooks the fact that the gravamen of the complaint is not that the plaintiff would have to pay unrealistically high rates if Sec. 530 were applied to it, but that the section is void under Article VI, Section 2 of the Constitution in that:

[fol. 256] "1. For no valid reason within the police powers or other reserved powers of the State of California, [Sec. 530 and related sections] place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Sec. 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States."

Thus it is clear that this action is based upon the *unconstitutionality* of Sec. 530, principally because it interferes with the plaintiff's discharge of its Constitutional powers and duties relating to the raising and the support of "Armies and a Navy". The first sentence of Article 1, Section 8 of the United States Constitution gives Congress the power to "provide for the common Defense and general Welfare of the United States". How the application of Sec. 530 would "hamper and hinder" the plaintiff in carrying out its Constitutional functions has been clearly shown by the testimony of high-ranking officers of the armed services. This "hampering and hindering" is not principally the result of the application of "class rates". The Constitutional objection, as we have seen, goes far deeper than that.

It is well settled that a state statute which places an unreasonable burden upon the discharge of a Federal function is unconstitutional.

Nearly a century and a half ago, Mr. Chief Justice Marshall laid down this fundamental principle, which he observed "may be almost termed an axiom". In M'Culloch v. The State of Maryland, 1819, 4 Wheat. 316, 426-427, the great jurist said:

> "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. • • •
>
> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms.

> It is so involved in the declaration of supremacy, so [fol. 257] necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution."

And, in connection with Judge McKeage's solemn avowal, *supra*,—an avowal in which we have the utmost confidence—we can only say, in the words of Mr. Chief Justice Marshall in this same opinion, "This, then, is not a case of confidence." 4 Wheat. at page 431.[2]

(d) *By Its Plain Terms, the Johnson Act Does Not Apply To This Case.*

The defendant contends that the Johnson Act, quoted in full, *supra*, prohibits this Court from granting the relief requested by the plaintiff. We are somewhat surprised that learned counsel seriously urges this point, in view of the fact that *four* conditions to the application of the Act are specified therein, *all* of which must concur, and each of which relates to an order, not a *statute*. Since the conjunction "and" is used as the connecting word between the conditions, it is clear that all four contingencies must be present before the Act can apply.

The very first statutory condition at once makes the Johnson Act inapplicable here; for it sets forth that it comes into play only when "Jurisdiction is based *SOLELY* on diversity of citizenship *or* repugnance of the *ORDER* to the Federal Constitution." [Emphasis supplied] In the instant case, the jurisdiction of this Court is based prin- [fol. 258] cipally upon the unconstitutionality of a *statute*, not of an "*order* . . . made by a State administrative agency or a rate-making body," etc.

(e) *The Other Grounds of the Defendant's Attack Upon the Jurisdiction Of This Court.*

The remaining attacks upon the jurisdiction are somewhat related, and will be considered together briefly. They are:

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[2] See also Osborn v Bank of the United States, 1824, 9 Wheat. 738, 870; Weston v City Council of Charleston; 1829, 2 Pet. 449, 468; Ohio v Thomas, 1899, 173 U.S. 276, 283; *Re* Heff, 1905, 197 U.S. 488, 505; Johnson v Maryland, 1920, 254 U.S. 51, 55-57.

(1) The plaintiff will not suffer irreparable injury in the absence of injunctive relief, but has an adequate remedy elsewhere.

(2) The Court is required by law to abstain from granting the relief requested in order to preserve comity between the plaintiff and the State of California.

(3) The subject matter of the complaint is within the exclusive jurisdiction of the State of California.

(1) We have fully summarized the allegations of the complaint. For the purposes of the motion to dismiss, they must be taken as true. The single allegation that the enforcement of Sec. 530 "would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public "patterns of movement," etc., of itself spells out one ground for equitable intervention. We are here dealing not chiefly with considerations of the market place, but with the plea of a constitutional sovereign to be permitted to discharge, without State interference, its duties in connection with its greatest task—the defense of the nation itself.

(2) Similarly, in none of the cases cited by the defendant under this heading was the United States Government seeking to have declared unconstitutional a State statute, plain on its face, that by its very terms would subject the Federal sovereign to restrictions and delays in the exercise [fol. 259] of its paramount right, power, and duty of providing itself speedily and economically with the engines of self-defense.

(3) The defendant contends that the subject matter of the complaint is within the State's exclusive jurisdiction. But the subject matter of the complaint is California's placing "an unreasonable burden and impediment on the United States in the discharge of its constitutional powers" in connection, as we have seen, with the national defense. We do not believe that national defense is "within the exclusive jurisdiction of the State of California." The plaintiff is not attacking the defendant's *general* power to

fix rates: it is merely objecting to a statute that by its terms permits a State Commission to impose "conditions" upon the granting of reduced rates to the Federal sovereign, even when they relate to activities connected with the national defense.

Heavy reliance is placed by the defendant upon the case of Penn Dairies, Inc., v. Milk Control Commission of Pennsylvania, 1943, 318 U.S. 261, 270, in which, pursuant to the Pennsylvania Milk Control Law, a renewal of the license of a milk dealer was refused by the Commission because the dealer, in violation of the state law, had sold milk to the United States below the minima fixed by the Commission. It was there held that such application of the State law to the dealer was not precluded by the Constitution or laws of the United States. Justices Douglas, Black, and Jackson dissented.

In the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they [wished], without incurring any penalty". Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

> [fol. 260] "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the *Penn* case did not involve the procurement of the engines of war. There is a constitutional difference between a can of milk and a hydrogen bomb!

8. *The Complaint States a Claim Upon Which Relief Can Be Granted.*

As the defendant itself points out, the section of its brief dealing with jurisdiction discusses "certain deficiencies in the complaint". In discussing other alleged "deficiencies", in addition to those asserted under the jurisdictional heading, the defendant objects that "Most of the allegations are not well pleaded "for one reason or another". The entire discussion of these asserted "defects" consumes less than one typewritten page, and ends with the following bare statement:

> "When the complaint is stripped of all the allegations that are deficient in one or more of these respects, the only things left are allegations that the California Legislature amended Sec. 530 . . ., and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. Even the second of these allegations is lacking in particularity. Assuming, however, without conceding, that these two allegations are well pleaded, they do not furnish any basis for relief by this Court."

It is clear that this assortment of glittering generalities adds nothing to the legal argument, and that the defendant is relying upon the first section of its brief as expounding the gravamen of its objection to the complaint. The second section contains an extensive vocabulary of adjectives, such [fol. 261] as "vague", "ambiguous", "conjectural", and "irrelevant", but does not greatly advance the thought.

9. *Conclusion*

In a dictatorship, the warlords do not even *demand*—much less *request*—authority to negotiate with private parties for the supply of their war needs. Autocrats *take* what they want!

It is therefore a heartening spectacle, in a Constitutional democracy, to see a group of military men, speaking for the sovereign itself, appear in a civil court to *plead* to be allowed to carry out their Constitutional functions by being

permitted to contract freely with privately-owned carriers to supply the Government's transportation needs.

But this very subordination of the military to the civil power—fundamental in every true democracy—itself imposes a grave responsibility upon civil courts. We dare not, in good conscience and under the Constitution of the United States, deny relief to such a suitor when it proves to our satisfaction that such denial would hamper the national defense.

Such proof the present plaintiff has produced in abundance. We do not believe that a federal court, after listening to such testimony and dispassionately reviewing the record, as we have done, can or should stay its hand when legitimate relief is requested by the armed forces of the nation.

Accordingly, we hold that, in so far as Sec. 530, *supra*, purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the plaintiff, it is invalid, void, and of no effect, as contravening the provisions of the United States Constitution relating to the national defense, *supra*. The defendant is permanently enjoined from [fol. 262] enforcing any of the restrictive provisions of Sec. 530 as against the plaintiff. Counsel for the plaintiff will prepare proposed findings of fact, conclusions of law, and form of judgment, in accordance with this opinion.

Dated this 30th day of April, 1956.

Dal L. Lemmon, United States Circuit Judge.
Oliver J. Carter, United States District Judge.
Oliver D. Hamlin, Jr., United States District Judge.

[fol. 263] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DEFENDANT'S PROPOSED MODIFICATIONS OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND FORM OF JUDGMENT PROPOSED BY THE PLAINTIFF—Filed May 29, 1956

The defendant respectfully proposes the following modifications of the findings of fact, conclusions of law, and form of judgment proposed by the plaintiff.

A. *Findings of Fact*

1. In paragraph XI, page 7, the plaintiff proposes a finding that "the counsel for the Public Utilities Commission stipulated in the record that in the event that Section 530 of the Public Utilities Code of California, as amended, were put into effect, he would recommend to the Commission that such hearings be dispensed with in cases involving the shipment of property for the United States"; and a finding that "it was likewise stipulated in the record by the [fol. 264] counsel and other responsible officials of the Commission that the Commission's procedure would be administered in such a way that the approval of rates proposed by carriers involving shipments for the United States would be expedited."

These proposed findings do not accurately state or paraphrase the stipulation made which appears at pages 548 and 549 of the transcript. Counsel for the defendant did not stipulate that he would recommend that "such hearings be dispensed with"; nor was any stipulation made that "approval" of rates proposed would be expedited.

2. In paragraphs XII and XIII on pages 7 and 8 of defendant's proposed findings of fact reference is made to "commercial rates" and "commercial rate" in contrast to "class or 'paper rate'." The contrast in the evidence, however, is between "class rates" and "*commodity rates.*"

3. The defendant proposes the following finding: On September 6, 1955, the defendant, in a proceeding to which the United States was a party, issued a decision implementing the California Legislature's amendment to Section 530 of the Public Utilities Code by cancelling, effective December 5, 1955, a certain provision in a minimum rate tariff established by the Commission. The effect of said cancellation was to withdraw from common carriers the privilege of deviating, in the case of traffic of the Armed Forces of the United States, from established tariff rates. The United States did not seek review of this decision in the manner permitted by California law for review of the Commission's decisions by the Supreme Court of California.

B. *Form of Judgment*

In paragraph 2 of its proposed form of judgment the plaintiff proposes a permanent injunction prohibiting the defendant Commission from regulating rates for the transportation of "property of the United States." Such a [fol. 265] sweeping prohibition is not supported by the evidence nor by the plaintiff's proposed findings of fact, nor by the plaintiff's proposed conclusions of law, all of which are concerned only with military traffic of the United States. They contain no support for an injunction prohibiting the regulation of rates for the transportation of other kinds of property of the United States.

Defendant's failure to object to the plaintiff's proposed findings of fact, conclusions of law, and form of judgment otherwise than as above specified is not intended as acquiescence therein.

Respectfully submitted,

/s/ Everett C. McKeage, /s/ J. Thomason Phelps,
/s/ William R. Roche, Attorneys for Defendant.

Dated: May 29, 1956

[fol. 266] AFFIDAVIT OF SERVICE BY MAIL (omitted in printing).

[fol. 267] [File endorsement omitted]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 5, 1956

The above-entitled action having come on to be heard before the duly constituted district court of three judges established pursuant to Title 28, Sections 2201, 2281 and 2284 of the United States Code, and the defendant having moved to dismiss the action, and full argument having been had on defendant's motion to dismiss on February 9, 1956, and the court having overruled the defendant's motion to dismiss on February 17, 1956, and a full hearing with submission of evidence by the plaintiff and the defendant having been had on the week of March 18, 1956, and counsel for the parties having been heard on April 19, 1956, and the court having filed its opinion herein on April 30, 1956, now, in accordance with the opinion heretofore filed, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I

In order to provide for the common defense, the United States has established throughout the United States and the world a number of installations and establishments, both

civil and military, which are integrated into a general nation-wide and world-wide system designed to maintain the country's strategic position in the light of the present [fol. 268] world-wide political and military situation. In order to supply the various operational and training establishments, there has been established what is commonly called a depot system, consisting of a number of storage and supply points. The various depots and supply points are integrated into a complex system throughout the world designed to meet the logistical requirements of the defense establishments at any particular time. There is a constant flow of matériel through this system at a velocity and in directions determined by the military needs.

II

There are approximately 152 military installations of all types situated within the State of California, consisting of depots, training centers, air stations, naval operation bases, research centers, proving grounds, embarkation centers, ammunition magazines, hospitals, and almost every other type of military establishments. In addition to the strictly military installations within the state, California is the center of the aircraft manufacturing industries of the country, and the various aircraft manufacturers, through contracts with the United States, perform research and experimental work in the development of aircraft and guided missiles. There is a constant flow of materiel of all types from out of the state to the various installations within the state, and from the installations within the state to other states. There is likewise a constant flow of materiel from an installation in the state to another installation in the state, either for consumption at the destination in the state or for further shipment outside of the state. There is a substantial shipment from storage points within the state to ports for shipment overseas and for the supply and repair of Naval vessels. Of 500 million dollars expended by the Department of Defense in the fiscal year of 1954 and 1955 for the transportation of materiel, approximately 20 million dollars was expended for the movement of property from one location in California to another location in California.

[fol. 269]

III

Many items of military materiel are highly secret in nature and, for security reasons, every effort must be made to limit the knowledge of the character of the items shipped to as few people as possible. In addition to the secret character of many of the military items, frequently the location of a military installation is a matter of secrecy and materiel routed to these locations must be routed in such a way that the ultimate destination is kept secret. There are a number of such installations in California and frequently shipments are made to such installations.

IV

Under the doctrine of dispersal as a defense against air attack, the various military installations in California and elsewhere, particularly the depots and supply centers, are usually widely dispersed and an effort is made in their location and function to see to it that the destruction of one facility would not completely disrupt the plan of operation in the event of emergency by creating critical shortages of essential materiel and items of supply. In addition, the depot system and other supply installations are so located that in the event of emergency there will be as little congestion as possible at the various ports and other transit centers, in order that maximum use may be made of the transportation facilities. Likewise, supply points are so located that it is possible to divert materiel from one port to another port on very short notice to minimize the effectiveness of enemy submarine operations. Due to the peculiar requirements of training centers, proving grounds, research centers and firing ranges, they are likewise usually located outside of large areas of population. Thus, due to the peculiar requirements of the establishments related to common defense, their location has little or no relationship to State boundaries or the normal channels of trade [fol. 270] or commerce but are fixed by strategic, tactical and logistical requirements.

V

As a result of the factors set forth above and other factors the pattern of military traffic differs essentially

from commercial traffic in many respects. First, military materiel is consumed in military activities and does not compete in the commercial market with commercial commodities. Secondly, military materiel consists of hundreds of thousands of items, being either weapons of war or related thereto, which have no relation whatsoever to the types of commodities which flow in the channels of trade. Thirdly, due to the peculiar requirements of military operations and activities, it is frequently necessary and desirable to ship a great many diverse items in one shipment or carload. Fourthly, from the nature of military operations and the location of installations, in a great many instances shipments are made to locations which have no relation to the normal flow of commercial traffic. Fifthly, due to the nature of military operations, frequently the necessity for shipment of materiel arises on very short notice, particularly in times of emergency. Sixthly, in many situations, particularly in times of emergency, time is of the absolute essence in making a shipment of materiel. Lastly, many items of military materiel are highly secret and at times must be secretly and circuitously routed for purposes of security.

VI

Due to the nation-wide and world-wide character of the military establishments and their close interrelation and integration one with the other, a very high percentage of military materiel situated in the depot system and other installations in any State, including California, at any given time, originates from outside of the State, and a very high percentage of such materiel, at any given time, is destined for points outside of the State. Materiel and items in sup- [fol. 271] ply which originate in the State, or are destined for points in the State, are mixed indiscriminately in the depot system and other installations with materiel which originates outside of the State, or is destined for points outside of the State. Due to the high cost of many weapons and other military equipment and the frequent change in design and improvement, an effort is made to keep the stocks and inventory in the depot system and other supply centers as low as possible. Thus, there is a rapid current of

materiel flowing through the depot system and the other installations to points of ultimate destination and consumption throughout the several States and overseas. Since in most instances such materiel is to be consumed in military activities which may depend on contingencies which arise from time to time in the world situation, frequently it is impossible to determine at any given time the ultimate destination of such materiel.

VII

A number of installations and establishments of the United States within California are situated on land which has been ceded by the State of California to the United States and is held by the United States under varying terms and conditions pursuant to the authority conferred upon it by article I, section 8, clause 17 of the Constitution of the United States. There are frequent shipments of property within the State originating in installations of this type or terminating in installations of this type.

VIII

Insofar as it is practical under the requirements of defense, it is the policy of the Defense Department to utilize commercial carriers in the transportation of its supplies. Since the creation of the Federal Government and the establishment of the Armed Services, it has been the practice in the moving of supplies and materiel for the United States by common carrier for duly authorized officers or officials of the United States to negotiate rates [fol. 272] for many Government shipments. When the Interstate Commerce Act was enacted in 1887 providing for the publication of uniform tariffs by common carriers in interstate commerce, section 22 provided that the general provisions of the act providing for the publication of uniform tariffs did not apply to shipments for the United States. Since the earliest times, the powers and duties of the officers of the United States to make such special arrangements for the transportation of property applied alike to shipments which were interstate or intrastate so far as geographic termini were concerned.

IX.

In engaging carriers to transport materiel and supplies from one installation in a State to another installation in the same State, it is the policy of the Department of Defense to engage only those carriers which are duly certificated and qualified under the State laws and regulations to operate on the highways of the State between the particular points involved. In the event that it is difficult for the officers arranging the transportation to determine whether or not the particular shipment in fact is interstate or intrastate commerce under applicable doctrines of law, it is the policy of the Department of Defense to engage a carrier which is duly certificated and qualified under the requirements both of the Interstate Commerce Act and the State statutes and regulations.

X

For many years section 530 of the Public Utilities Code of the State of California expressly exempted transportation of materiel of the United States from the provisions of the statute relating to the filing of tariffs and approval of rates, and for many years shipments were made by the United States between points in California in accordance with the long established general custom of making special arrangements or contracts for such shipments when circumstances so required. In July 1955 the California Legis- [fol. 273] lature amended section 530 of the Public Utilities Code. California Statute 1955, Ch. 1966. This amendment expressly provided that the Public Utilities Commission of California might "permit common carriers to transport property at reduced rates for the United States, State, county or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

XI

Under the normal practice of the Public Utilities Commission of California at least a month has been required for the approval of any rate submitted to it for approval if no person or corporation protested such rate. It has

likewise been the practice of the Public Utilities Commission to hold a public hearing in the event that a published rate were protested. Public hearings under this procedure are frequently protracted. At the hearing in the case at bar, the counsel for the Public Utilities Commission stipulated in the record that in the event that section 530 of the Public Utilities Code of California, as amended, were put into effect, he would recommend to the Commission that such hearings be dispensed with in cases involving the shipment of property for the United States. It was likewise stipulated in the record by the counsel and other responsible officials of the Commission that the Commission's procedure would be administered in such a way that approval of rates proposed by carriers involving shipments for the United States would be expedited.

XII

Under the theory of rate regulation in California and elsewhere, every common carrier is required to have in existence at all times a published rate to cover the shipment of every known item between every conceivable point. This rate structure is known as the class or "paper rate." Since the channels of commercial traffic are regular and well defined in accordance with the stability of trade, large commercial shippers seldom use the class rate but negotiate [fol. 274] rates with the carriers known as "commercial rates," which are peculiarly suited and adapted to the requirements of the commerce involved. These commercial rates are usually considerably lower than the class rates. Very little commercial traffic moves at the class rate.

XIII

As previously found, military shipments are frequently made to remote destinations on short notice, and in many situations, particularly in times of emergency, time is of the essence. Due to the character of the commodities and points of origin and destination, from the nature of things, there will be no published commercial rate under which the shipment might be made. As a matter of practice in times past in situations of this sort, if a shipment were relatively

small, the officers of the United States would ship at the class rate. In the event that the density and volume of the particular shipment were large, the officers of the United States, through their power to make special arrangements, will negotiate with the carriers for a rate which would be comparable to a rate established in commercial traffic for a similar shipment. Through flexible procedures now employed by the various military services, rates for shipments of this type can be arranged in a matter of hours, and, if time is of the absolute essence, the shipment might be made and the rate would be arranged retroactively. In negotiating rates in this manner, it is the policy of the Department of Defense to base a negotiated rate on studies of comparable commercial rates. Many shipments of this character are made in the State of California. In the event that section 530 of the Public Utilities Code of California, as amended, is put into effect, making it necessary for special rates for such shipments to be approved by the Commission under present Commission procedures many of such shipments would have to be made at the class rate. In many instances the class rates would be 50% to 100% higher than the commercial rate for shipments of similar character.

[fol. 275] XIV

From the nature of military operations and movements, it is frequently necessary and desirable to ship truckloads and carloads of hundreds of different items for the supply of a unit or division, or the loading of some vessel for a military expedition, or a similar operation. In many instances these numerous items are segregated into chests and boxes designed to facilitate tactical requirements under field conditions. In shipments of this sort it has been the custom and practice for the officers of the United States to negotiate and arrange a rate for the entire truckload or carload. Such rates are known as "freight all kinds" rates, and shipments are so described in simple form on the bills of lading and other shipping documents. There is no provision in the California Code or regulations for the making of such shipments. Accordingly, in the event that section 530 of the Public Utilities Code is amended to apply to

shipments by the United States, this type of arrangement would be abolished. This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.

[fol. 276]

XV

In addition to the fact that the abolishment of the practices of the officers of the United States in negotiating rates for "freight all kinds" on truckload and carload basis would cause undue delays in many situations, it would also invariably increase the freight rates charged to the United States in many particular situations. This would result from the fact that many military items, particularly those relating to weapons of war, electronic equipment, and military aircraft, have no counterpart in commercial traffic. Accordingly, in many situations it would be impossible to segregate and ship the various items under any rate other than the class rate. In addition, due to the fact that military items are segregated and arranged in accordance with tactical and logistical requirements, and due further to the fact that under the class rate structure the entire unit of shipment will bear the classification of the highest item in the mass, frequently many military shipments which for tactical reasons cannot be resegregated would be thrown into a very high classification. In many situations, the freight rate for such shipments would be increased by 150%.

XVI

In the event that it were necessary for the officers of the United States to classify the many items shipped by it prior to shipment, to segregate the items, and in many instances

meet the packing requirements customary in commercial shipments, it would be necessary for the shipping agencies of the United States to increase their forces in order to meet the additional administrative burden. In typical situations the increase in personnel would amount to as high as fifty percent. Men who are now free for more direct military service might have to be trained and used for the preparation of documents and the attention to administrative [fol. 277] and shipping detail. Not only would the administrative burden be increased on the shipping level, it would likewise be necessary to increase the personnel to meet the increased administrative load at the higher echelons in the work of review and in auditing the shipping documents.

XVII

In the event that it is necessary for the officers of the United States to obtain approval of rates for the shipment of military materiel and other Government property by the California Commission, and other state commissions, a great deal of time of skilled personnel would be consumed in commission proceedings. It would become necessary for highly skilled officers in operational functions to consume considerable time in the preparation of exhibits and in testifying before the commission.

XVIII

In the event that Section 530 of the California Code, as amended, is put into effect, the Commission would have the power to require the officers of the United States to furnish all information and data necessary for it to determine whether or not a rate were just and reasonable. Under this power the Commission might require the furnishing of information of a secret nature relating both to the type and character of the items or materiel shipped or to the destination of the shipment. Revelation of information of this sort to a public body would seriously jeopardize the security of the United States. In addition to the fact that the revelation of specific information of a secret nature would jeopardize the security of the United States, the furnishing of general information to the public utilities

commissions of the various states might reveal a pattern of movement which would be subject to interpretation by espionage agents who might gain therefrom vital information for the aid of an enemy.

[fol. 278] At the hearing in this case, the counsel for the Commission stipulated in the record that in administering Section 530 of the Public Utilities Code, as amended, he would recommend to the Commission that a rule be adopted whereby upon certificate of responsible officers of the United States to the effect that certain information required for rate determination was secret, the Commission would not require the furnishing of the information.

XIX

Due to the nation-wide and world-wide integration of the depot system and other military installations and the character of the flow of military items and materiel through the depot system, it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character under applicable doctrines of law. Thus, in many situations officers of the United States would be required to make difficult determinations of law and fact to determine whether or not particular shipments fell within the provisions of Section 530, as amended. In addition, many shipments within the state are made from installations and enclaves over which the United States has jurisdiction. In many situations it would be difficult to determine whether or not such shipments were subject to regulation by the state commission. In addition, the necessity of such determination in many instances would make it necessary to segregate materiel within the various depots and installations in accordance with its origin or destination, and in making many shipments it would be necessary to segregate material put into particular trucks or cars in accordance wtih its origin or destination. Thus, the necessity of the determination would result in delays, increased man-hours of work on the part of military personnel, friction and possible litigation.

[fol. 279]

XX

In the event that a number of states in addition to California assert jurisdiction over the regulation of the rates for the shipment of military materiel, the delays, increased cost of transportation, increased administrative burden and danger of revelation of secret matters might become so great that if might be necessary to redesign and relocate the depot system or to curtail the functions of certain depots for the purpose of bringing about a situation in which most of the shipments of the materiel would be in interstate commerce and therefore not subject to the regulation of state commissions. Such a rearrangement of the depot system would have no rational relation to the logistical principles upon which it is now based and would entail a loss of efficiency in the performance of the functions of the national defense.

XXI

Sharpe General Depot situated at Stockton, California, is a large general supply depot carrying such supplies as food, clothing, medicine, engineering equipment, tenting, and similar supplies. Normally this depot ships general supplies to the various military installations within the state and to ports for shipment overseas. The primary mission of the depot, however, is to furnish relief in the event of disaster resulting from earthquake, fire, or flood. Most of the general military supply functions of this depot could be performed efficiently from a general depot located at Ogden, Utah. In the event that the activities of Sharpe General Depot were curtailed, of necessity its capacity to furnish relief in times of disaster would be reduced.

XXII

Certain installations within the State of California are situated near state boundaries and alternate routes are available for the shipment of materiel from the installations to points within the state, one of which routes would cross state boundaries. In certain situations, different car-
[fol. 280] riers are certificated to carry over the different routes. In the event that the regulation by the State Com-

mission resulted in undue delays, increased expense and administrative burden, the officers of the United States charged with the responsibility of routing the shipment of the materiel would choose the interstate route. This would result in some instances in prejudice to carriers and might entail a longer route.

XXIII

The delays, increased administrative burden, increased expense and the danger to security that would result from the application of section 530 of the Public Utilities Code, as amended, would be multiplied many times in time of war. In the event that a number of the states enacted similar statutes, a serious impediment would be placed on the successful prosecution of the war.

XXIV

Since the items and commodities shipped by the United States do not compete in commercial markets, there can be no prejudice to persons or localities in the State of California if the United States follows the custom and practice of negotiating rates with the carriers directly for particular shipments.

XXV

In its brief directed at the defendant's motion to dismiss this action, the counsel for the plaintiff took the position that under the terms of section 2112 of the Public Utilities Code of California officers of the United States in engaging carriers within the state would be subject to criminal prosecution and possible jail sentences and fines for any violations of the Public Utilities Code or regulations of the Commission. At the oral hearing on the motion to dismiss, the counsel for the Commission did not take issue with the interpretation placed on the statute by the counsel for the plaintiff.

[fol. 281] XXVI

All carriers which carry property for the United States within a state at less than published rates do so voluntarily. There are approximately 12,000 carriers within the State of

California which have authority to carry property for the United States within the state. Approximately 100 of such carriers actually engage in this traffic regularly. There has been vigorous competition in recent years among the carriers specializing in the carriage of Government property, and there has been some lowering of the general rate level in this particular traffic. However, there is no evidence of record of any bankruptcy or financial disaster on the part of these carriers. Generally, the transportation industry within the State of California is in a healthy economic condition. The Annual Report of the Public Utilities Commission of the State of California for the fiscal year 1954-1955 shows an earned gross revenue of $550,730,132 on the part of all carriers. This was an increase of $11,696,720 over the gross revenue for the preceding year. It was an all time high. During this year the United States expended approximately 20 million dollars within the state for transportation from one installation in the state to another. The Annual Report likewise shows that the fiscal year was one of general freight rate stability.

Conclusions of Law

I

The court has jurisdiction over this cause and the parties thereto.

II

The complaint states a claim upon which relief can be granted.

III

The complaint describes an actual controversy within the meaning of Title 28 U.S.C. section 2201 which confers upon this court the power to declare the rights and duties of the parties to the action.

[fol. 282]

IV

The burden rests upon the plaintiff to establish by clear proof that the pertinent provisions of section 530 of the Public Utilities Code of California as applied to it are un

constitutional and void as being repugnant to the Federal Constitution.

V

The evidence of record clearly proves that for no valid reason within the police powers or other reserve powers of the State of California the application of section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilties of supplying the Armed Services and providing for the common defense.

VI

By section 22 of the Interstate Commerce Act, 24 stat. 387, the Armed Services Procurement Act, 41 U.S.C. section 151(c), the Federal Property Administrative Services Act of 1949, Public Law 1952, 81st Cong., 1st sess., sections 201 and 202, 63 stat. at page 377, Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by Commissions and other bodies vested with the power of regulating the rates for the transportation of property generally.

VII

The regulation of the rates for the shipment of military materiel intrastate by the several States would so drastically hamper and interfere with the officers of the United States in the discharge of their responsibility of supplying the defense establishments and related activities and would so endanger the security of the United States that State statutes conferring such power upon State regulatory bodies would be unconstitutional and void as contravening [fol. 283] the provisions of the United States Constitution relating to the national defense in the absence of any act of Congress. Such State statutes would be valid only upon the condition that Congress enacted a statute expressly authorizing the various States to regulate such rates. See collation of cases in *Morgan* v. *Virginia*, 328 U.S. 378.

VIII

The principle announced in *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, has no application to the facts in this case because under the regulation there involved there would be no direct interference with the officers of the United States in the discharge of their responsibilities, and there would be no delays or increased administrative burden and revelation of secret matter in the procurement of the items of supply there involved. Further, the regulation of the price of milk by a State has a relation to the health of the population of the State.

IX

Since the issue in the instant case is one of the existence of a constitutional power, stipulations by counsel of the State Commission and other officials of the Commission that its regulations will be of such character that any burden on the United States in the discharge of its responsibility to provide for the national defense will be brought to a minimum and that it will not require the furnishing of secret information in the administration of the statute involved, though made in utmost good faith, are irrelevant. *McCulloch* v. *Maryland*, 4 Wheat. 316.

X

Insofar as section 530 of the Public Utilities Code of California purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers to the plaintiff and the carrying of its property and materiel, it is invalid, void and of no [fol. 284] effect as contravening the provisions of article I, sec. 8, clauses 11, 12, 13, 16 and 17, and article IV, sec. 3, clause 2, of the Constitution of the United States.

XI

In the event that section 530 of the Public Utilities Code of California, as amended, is applied to the plaintiff, it will

suffer irreparable injury and it has no adequate remedy at law.

Dated this 5th day of June, 1956.

/s/ Dal M. Lemmon, United States Circuit Judge.
Oliver J. Carter, United States District Judge.
O. D. Hamlin, United States District Judge.

[fol. 285] [File endorsement omitted]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Civil Action No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

JUDGMENT—June 5, 1956

This case having come on for final hearing, and the court having filed its opinion on April 30, 1956, and Findings of Fact and Conclusions of Law having been filed this day, now therefore in accordance with the opinion and Findings of Fact and Conclusions of law it is ordered, adjudged and decreed:

1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of article I, section 8, clauses 11, 12, 13, 16 and 17, and article IV, section 3, clause 2, of the Constitution of the United States.

2. Defendant Public Utilities Commission of the State of California and its agents and employees are hereby permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for the transportation of property of the United States.

Dated this 5th day of June, 1956.

/s/ Dal M. Lemmon, United States Circuit Judge.
Oliver J. Carter, United States District Judge.
O. D. Hamlin, United States District Judge.

[fol. 286] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 35107

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 31, 1956

I. Notice is hereby given that the Public Utilities Commission of the State of California, the defendant above named, hereby appeals to the Supreme Court of the United States from the final Judgment dated June 5, 1956, and entered in this action on June 5, 1956.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the United States of America.
2. Order to Show Cause and Temporary Restraining Order.

3. Verification and Affidavit in Support of Temporary Restraining Order.
4. United States Marshal's return of service on Order to Show Cause and Temporary Restraining Order.
5. Defendant's Motion to Dismiss Complaint.
6. Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint.
7. Brief of the United States of America.

[fol. 287] 8. Affidavit dated February 6, 1956, of Herbert K. Hyde, Commissioner, Transportation and Public Utilities Service, General Services Administration.

9. Affidavit subscribed December 22, 1955, of Paul F. Yount, Major General, United States Army.
10. Affidavit subscribed December 30, 1955, of John P. Doyle, Major General, United States Air Force.
11. Order filed February 17, 1956, denying Defendant's Motion to dismiss the Action.
12. Answer of Defendant.
13. Reporter's Transcript, pp. 1-40, of hearing on December 2, 1955, and December 6, 1955.
14. Reporter's Transcript, pp. 1-118, of hearing on February 8, 1956.
15. Reporter's Transcript, pp. 1-127, of trial on March 19, 1956.
16. Reporter's Transcript, pp. 128-248, of trial on March 20, 1956.
17. Reporter's Transcript, pp. 249-359, of trial on March 21, 1956.
18. Reporter's Transcript, pp. 360-503, of trial on March 22, 1956.
19. Reporter's Transcript, pp. 504-552, of trial on March 23, 1956.
20. Reporter's transcript, pp. 1-90 of hearing on April 19, 1956.
21. Examples of U. S. Government Shipments Offered by Plaintiff's Witnesses, with Reference to Transcript and Exhibits (Documents presented to Court at Hearing on April 19, 1956.)
22. Plaintiff's Exhibit 3.
23. Plaintiff's Exhibit 4.
24. Plaintiff's Exhibit 5.

25. Plaintiff's Exhibit 6.
26. Plaintiff's Exhibit 7.
27. Plaintiff's Exhibit 8.
28. Plaintiff's Exhibit 9.
29. Plaintiff's Exhibit 10.
30. Plaintiff's Exhibit 11.
31. Plaintiff's Exhibit 12.
32. Plaintiff's Exhibit 13.
33. Plaintiff's Exhibit 14.

[fol. 288] 34. Defendant's Exhibit A.

35. Defendant's Exhibit C.
36. Defendant's Exhibit D.
37. Defendant's Exhibit E.
38. Defendant's Exhibit F.
39. Defendant's Exhibit G.
40. Defendant's Exhibit H.
41. Defendant's Exhibit I.
42. Defendant's Exhibit J.
43. Defendant's Exhibit K.
44. Defendant's Exhibit L.
45. Defendant's Exhibit M.
46. Opinion of Court filed April 30, 1956.
47. Defendant's Proposed Modifications of Findings of Fact, Conclusions of Law, and Form of Judgment Proposed by the Plaintiff.
48. Findings of Fact and Conclusions of Law.
49. Judgment.
50. Notice of Appeal to the Supreme Court of the United States.

III. The following questions are presented by this Appeal:

A. Preliminary or Threshold Question.
Did the District Court have jurisdiction to entertain the Complaint?

(1) Did the complaint allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201?

(2) Did the Plaintiff fail to exhaust the Administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California?

(3) Did the complaint involve a matter which is within the primary jurisdiction of the Public Utilities Commission as an administrative agency of the State of California?

(4) Was the District Court prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff?

[fol. 289] (5) Did the complaint allege facts showing irreparable injury to the Plaintiff in the absence of injunctive relief?

(6) Did the Plaintiff have an adequate remedy elsewhere than in the District court?

(7) Was the District Court required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California?

B. Evidentiary Questions.

(1) Did the District Court err in overruling Defendant's objections to questions calling for expressions of opinions by Plaintiff's witnesses upon the ultimate issues in the case?

(2) Did the Plaintiff prove at the trial, by a preponderance of the evidence, that it would suffer irreparable injury in the absence of injunctive relief?

C. Ultimate Question.

Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

/s/ Everett C. McKeage, /s/ J. Thomason Phelps, /s/ William R. Roche, Attorneys for Public Utilities Commission of the State of California, State Building, San Francisco 2, California.

Endorsed: Filed July 31, 1956, C. W. Calbreath, Clerk.

[fol. 290] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

CROSS-DESIGNATION OF RECORD TO BE CERTIFIED—
Filed August 9, 1956

To: The Clerk of the United States District Court for the Northern District of California, Southern Division

In preparing the transcript of record in the above entitled cause on the appeal of plaintiff, taken July 31, 1956, please include in said transcript the following:

1. Plaintiff's Exhibit 15.

2. This Cross-Designation, together with proof of service thereof.

Daniel M. Friedman, Attorney, Department of Justice, Washington 25, D.C., Counsel for Appellee United States of America.

August 8, 1956

[fol. 291] PROOF OF SERVICE (omitted in printing)

[fol. 292] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Hon. Oliver J. Carter, Judge.

No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

Reporter's Transcript of Friday, December 2, 1955

APPEARANCES:

For the Plaintiff: Lloyd H. Burke, United States Attorney, by Lynn J. Gillard, Esq., Assistant U. S. Attorney.

For the Defendant: J. Thomason Phelps, Esq.

[fol. 293] Friday, December 2, 1955—9:30 A.M.

The Clerk: Ex parte matters?

STATEMENT BY MR. GILLARD

Mr. Gillard: Your Honor please, there has been filed with the Clerk a complaint and a verification attached to it which seeks an injunction against the Public Utilities Commission of the State of California, and in the interim seeks a restraining order to prevent going into effect of the recently enacted Section 530 of the Public Utilities Code of the State of California.

The complaint sets forth in detail the history of the situation involved with reference to shipments of federal property within the State of California, and the fact that it is against the constitutional powers of the United States

Government to have this interference by the State of California in connection with the movement of the property.

The section involved, which was amended in July of this year and effective September 7th, added for the first time this language:

"The Commission may permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, to such an extent and subject to such conditions as it may consider just and reasonable."

Prior to that enactment the common carriers themselves [fol. 294] were exempt from the general requirements of assessing in their tariff charges the property to be transported by the United States. This action gives the Commission the sole power to allow common carriers to transport property at rates other than set in their tariffs, and thus, in effect, constitutes the Public Utilities Commission an intervening agency between the United States and its duly authorized agents in negotiating contracts of carriage and the common carriers, on the other hand.

The complaint alleges that there are approximately 153 military installations in this state, and that in 1954 in excess of 2,000,000 tons of military freight was transported at a cost in excess of $20,000,000. That it has always been the practice, so far as the federal government is concerned, to exempt the transportation of property for the government, and that was incorporated in the Interstate Commission Act of 1887, Section 22 of which exempted shipments for the United States.

And the present law of negotiating a contract makes no distinction with respect to interstate and intrastate shipments, concerning the power and duty of officers of the United States to negotiate rates for transportation of property.

The complaint alleges that the effectiveness of this Section 530 of the Public Utilities Code would greatly impede [fol. 295] the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence, and in many situations would expose to the public patterns of movement and traffic which would be subject to inter-

pretation by the intelligence agents of foreign powers and might jeopardize the security of the United States.

It would likewise greatly increase the administrative expense of the United States by requiring its officers and officials to disentangle certain commodities from the mass of commodities in the current of commerce.

In that connection the complaint had alleged that shipments both interstate and intrastate were commingled in bulk, and shipments in the same group and bulk were sent both inter and intra state, and the disentangling of those would cause further burden upon them.

The complaint also alleges that because the shipments are made with respect to military installations only, and to and from those installations in the state, they are not in the nature of things commodities which are in competition with commodities shipped to and from commercial shippers, and therefore there can be no discrimination or unreasonable prejudice to them by virtue of the fact that that long continued practice of different rates for United States property should be continued.

[fol. 296] The complaint alleges that if the act goes into effect there would be an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States.

That it would place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of the Congress of the United States.

That it contravenes the policy of Congress implicit in the Federal Property and Administrative Services Act of 1949.

That in so far as it places upon common carriers the duty of determining when shipments are interstate or intrastate, the section is repugnant to the Fourteenth Amendment of the Constitution because it is vague and uncertain, and places upon the common carrier the duty and necessity of resolving intricate questions of law and fact.

I think the complaint and the ap-ended verification indicates that there is a real controversy involved in the application of this section of the California law; that there

is a constitutional issue involved; and that the complaint and verification to it set forth facts, and state that there will be immediate and irreparable damage to the United States in the event that the section goes into effect.

[fol. 297] The Public Utilities Commission has by order implemented this Section 530 of its Public Utility Code, and that order is to take effect at 12:01 a. m. on Monday, December 5th, so that if action is not taken as of today the section will be in effect as of a minute after midnight on Sunday.

The complaint by setting forth the fact that there will be this great and irreparable injury to the United States sets forth a proper ground for the exercise by this Court of the appropriate jurisdiction to issue a restraining order.

And contrawise, there will be no unnecessary interference with any of the functions or proper responsibilities of the Public Utilities Commission, and there will be no burden placed on the common carriers of property in the state inasmuch as if the status quo can be maintained as has existed for a great many years; and for the brief period it will take to hear and determine this matter, no injury could result to them.

We have, accordingly, prepared an Order to Show Cause and temporary restraining order for your perusal and signature.

And in that connection, if the Court is so advised as to grant it, it is our request that the matter be set for hearing following the period of the holidays in the month of [fol. 298] December because of the necessity for the Department of Justice to bring its personnel and witnesses from the Army and the Department of Defense and from Washington, and therefore we would suggest, if the Court is so disposed to grant the restraining order, the hearing be set for January 9th.

The Court: I might say for the record, Mr. Gillard was kind enough to give me a copy of the proposed complaint and restraining order so that I would have a chance to examine it before this was heard this afternoon.

Therefore, I have read the complaint and the proposed restraining order and given some attention to the basic fundamental principles that are involved in it in order to determine whether or not it stated sufficient grounds for a basis for issuing the temporary restraining order.

Mr. Gillard: If I may interrupt, I at your suggestion notified the Public Utilities Commission, and a representative of that office is in court now.

The Court: I intended to ask that, and if he has any desire to make any appearance at this time or to make any statement I would be pleased to hear from him.

Do you desire to make an appearance at this time or just to make some statement to the Court?

Mr. Phelps: I would like to do both, if Your Honor please.

[fol. 299] The Court: Then you may step forward and do it, sir. Would you state your appearance for the record, then?

Mr. Phelps: Yes.

My name is J. Thomason Phelps. I am one of the attorneys for the California State Public Utilities Commission.

The Court: Yes, Mr. Phelps?

STATEMENT BY MR. PHELPS

Mr. Phelps: I appreciate the courtesy that you and Mr. Gillard have extended to us in giving us an opportunity to come here. I appreciate that this matter is being presented on short notice.

I have just been handed, just before court resumed, a copy of the complaint, and I have not yet seen a copy of the restraining order. So what I have to say will be predicated largely upon what was described to me by Mr. Gillard yesterday as what would be the probable contents of the complaint and restraining order.

If I can accept that description of the contents of the documents, I think I can say to Your Honor that it would be a most grave mistake to grant this restraining order. And I should like to indicate the reasons for saying that. It may take some time to do so, Your Honor, to put before you clearly the considerations that I have in mind. But I think I can safely say this, that very large interests are involved and many people are involved. There are literally thousands of carriers, motor truck carriers, in the State of [fol. 300] California who potentially are affected or will be affected by the restraining order proposed.

There are very large monetary considerations also involved, and before a restraining order is issued in this matter I should like to suggest to Your Honor that careful consideration should be given to the matters which I should like to present to you.

I regret that the matter is complex, but in order to put before you clearly what I believe are the fundamental considerations, it may take me some time to do it.

The Court: Well, Mr. Phelps, may I ask you this at the outset so that we will understand—and I intended to ask Mr. Gillard this because, as I understand it, what is requested of me now is the issuance of a restraining order which would maintain the status quo as existed before, or as it exists now and before this Act goes into effect, and asking me to set down a time and place for a hearing on the question as to whether or not I should issue an interlocutory injunction.

As I deem the complaint as it is set up, I am required to request of the Chief Judge of this Circuit the conveyance of a three-judge district court. As I analyze the United States Statute under which this court is convened, I have the power, as the judge to whom the application for temporary restraining order and interlocutory injunction is [fol. 301] presented, I have the power to issue that.

If I do issue it, then the matter of hearing on making the injunction permanent comes on before the three-judge district court when it is convened. At that time, of course, evidence would be taken.

My thought on the matter and the question I want to ask you is, does not the complaint state sufficient that it is my duty to issue a temporary restraining order and then set down an early date for hearing on the question of whether or not I should issue an interlocutory injunction, at which time you and the government can come before me at the time set, which can be in the very near future, as to whether or not I should put into effect or continue the restraining order as an interlocutory injunction, and until the matter is then heard permanently by the three-judge court?

Mr. Phelps: Ordinarily, Your Honor, I would most certainly accede to that suggestion.

But here there are unusual circumstances, and let me describe what they are.

The Court: I ask the question because I wanted to be sure you have given consideration to that.

Mr. Phelps: Yes, indeed I have, Your Honor.

The Court: Many times the parties say, "Well, let the restraining order issue and make it the interlocutory injunction, and then we will determine the matter on the [fol. 302] hearing of the permanent injunction."

Mr. Phelps: Yes, Your Honor.

The Court: That's done a number of times, and it obviates the necessity of that one hearing.

Mr. Phelps: Yes, I am familiar with that practice, Your Honor, and think it is certainly reasonable under most circumstances. But here I think there are special facts involved which, I submit, make it inappropriate.

These are the reasons:

The restraining order that is sought in its terms purports to perpetuate for the time being what is called the status quo. Now, there is the difficulty.

The Commission has already issued certain orders which, merely by the lapse of time and complete inaction by the Commission, will become effective as of 12:01 Monday morning. And as of that date the trucking industry that is involved here presumably is prepared to move forward on the assumption that that order will become effective on that date. And I daresay large commitments for transportation have been made on that supposition—a supposition, I should say, Your Honor, which has been predicated upon 90 days notice to the whole industry and to the government and all other parties interested.

To put it another way, the carrier industry and the government and other services have had ninety days within which to prepare for the effectiveness of this order which [fol. 303] the Commission has already entered. So that, as I say, if the Commission does nothing, that order will become effective.

Now, any injunctive relief which this Court might seek to render would have to do more, it seems to me, than merely say to the Commission, "Don't enforce this order," because notices—as I say, the parties have had 90 days

notice to get ready. And how could the thousands of carriers in the industry be notified of what this Court had done between now and midnight next Sunday?

Moreover, the Commission presumably, if it sought to comply with this Court's order, would have to convene and sign out a new order countermanding its present order, and give notice to thousands of carriers in the industry countermanding its present order.

Now you see, between now and Monday morning that's impossible.

The result would be that perhaps some of these carriers might get such notice. Others I am sure would not get it. Complete confusion and chaos would obtain as to what was the applicable rates as of 12:01 next Monday morning.

The Court: Well, as I see it, as it stands now, however, at this particular phase of transportation the rate is determined by contract or by agreement between the carrier and the government, isn't that so?

Mr. Phelps: As of the present time that's true, Your [fol. 304] Honor. But commencing as of midnight Sunday night that is no longer possible. And I would suppose that many a carrier, in expectation of the effectiveness of that order, have agreed to transport properties for the government predicated upon the new rates, and in the expectation that new rates will govern the transportation effective as of that date.

Now, any order issued by this Court, assuming as we must that the Commission and all other parties would in good faith attempt to carry out this Court's order, the difficulty is, what could they do to avoid the confusion that would result from an attempt, at this late date, to interfere with the effectiveness of this new rate order?

The Court: Certainly there are no contracts in existence that would call for the new rates, are there? I doubt if the government would enter into any—that is, the government agencies dealing with this matter, because the government agencies are the very agencies who are raising the question here.

It is principally the defense establishment. They are not going to enter into any relationship with the carriers which would involve the government in a contractual obligation to pay any rate higher than that which they have

already contracted for, or higher than that which they can contract for in a free bargaining position.

Now, it is true that the order may go out and there may [fol. 305] be confusion. And I can readily understand how there can be confusion on the part of certain carriers as to whether or not they should not attempt to charge a higher rate. But what about the other side, the confusion in the government agencies which have government laws, that is, government statutes and departmental regulations which have said they can't follow the Public Utility Commission's rate structure, and therefore they are under a duty not to obey the law?

Without an injunction, they are going to be in the position of either violating their own departmental regulations or being at war with the State of California.

Mr. Phelps: Your Honor, that was the next point I was going to mention.

I believe that the government as a shipper should be required, like other parties, to exhaust its administrative remedies. And in the absence of a restraining order of this Court, the matter of the appropriate rate level may be adjudicated and litigated later on in an orderly way when the time comes for the carrier to send its bill and the government to take up the question of what is a proper rate to be paid.

It can then be handled in an orderly way as it comes up. The government is not losing anything, Your Honor. I have the greatest difficulty in seeing how any irreparable injury is going to be sustained by the United States Gov- [fol. 306] ernment if this restraining order is not issued.

The Court: Except their contingent liability to pay more for shipping freight than they are now.

Mr. Phelps: Well, that's it, Your Honor. You say "contingent liability." But when the question of that liability comes up in court, there will be the time to litigate that question, and nothing will have been lost by the absence of an injunction.

The Court: Well, their point is that the statute is unconstitutional, and that therefore it is null and void and of no force and effect.

If they are correct in that conclusion, then what about

the confusion that will result by allowing the order to become effective and allowing the dispute to come into existence between the carriers and the government?

In other words, it seems to me that, as in all cases where there is a going method of operation and a proposed change in it, that there are equities on each side. This is not a one-sided proposition. The basic question this Court has to decide on the issuance of any type of restraining order is to balance the equities. Isn't that the real problem?

Mr. Phelps: Yes, Your Honor.

The Court: And it is the immediate determination that is made in the temporary restraining order, and it is con- [fol. 307] tinued on an interlocutory basis, and then is determined on the hearing as to whether or not the injunction should be made permanent.

Now, it may well be that the statute is not unconstitutional, that the State is well within its authority and the government's position here is in error, and that therefore the order should go forward.

Now, may I ask you, other than confusion—and I concede there would be confusion, and I would say that there is considerable grounds for saying to the government agency here involved, not the Department of Justice, but the agency which is dealing in the transportation field, that that agency may have been dilatory in not getting this matter before this court at an earlier date so that notice could have been given to the Public Utilities Commission, and so on, in disposing of this matter.

But assuming that to be true, that still doesn't weight the equities one way or the other any more than they already are weighted.

Mr. Phelps: Well, Your Honor, may I suggest that it does affect the equities, the equities always being somewhat affected by laches and parties neglecting to take steps in time.

And here, as I say, in the very proceedings before the Commission—and mind you, and I should have said this, [fol. 308] too, the Commission at the request of the United States Government has already granted a 90-day extension of time of its order.

The Court: And I understand it refuses to extend it further.

Mr. Phelps: That is right.

Now, within that period of time it was represented to the Commission by an agent of the United States Government, by its counsel appearing before the Commission, it was represented that the 90-day period would be used by the United States government and the carriers to negotiate a new rate agreement.

Now, the first period, I found just before coming here in the Commission's record a statement by counsel for the Department of Defense, Mr. Mayo, first requesting a 45-day extension of the effective date of the order; then upon reconsideration apparently he requested 90 days, and it was the 90-day period that was granted by the Commission, it being understood, I think, on all sides that that would be an adequate period within which the parties could renegotiate the rates under which government traffic would move.

Now, here at the eleventh hour and fifty-ninth minute, after a lapse of 90 days, when the industry is all geared to go forward under the new rates, or at least under a changed rate structure, the government now seeks a restraining order on the ground of irreparable injury to the [fol. 309] United States Government.

It seems to me, Your Honor, the equities are not in favor of the plaintiff here.

The Court: Well, of course I would hate to deprive the group of carriers who worked so hard to get this legislation passed of the fruits of their hard labor, the early fruits of their hard labor. But I don't know whether delay is actual deprivation in this matter.

I am not under any illusion about how this legislation came into existence. Having been a member of the Legislature myself, I know what occurred. I can read between the lines.

But the problem I have to decide here before me is not that question, but the question of who is going to be more harmed by the issuance or non-issuance of the temporary restraining order.

Mr. Phelps: Yes. Well, my position is, Your Honor

what can the Commission do or what will Your Honor expect the Commission to do in compliance with the restraining order? Who is going to be restrained from doing what? That's what is not clear to me.

The Court: The Public Utilities Commission, by the language of the temporary restraining order, I believe is restrained from carrying this order into effect.

Mr. Phelps: Would that mean, Your Honor —

The Court: (Interposing) I concede that that is going [fol. 310] to cause a mechanical problem, but I think that the end result—I am not too impressed, Mr. Phelps, by the real question, because the charges that will be made—that is, assuming they are made, the collection is going to be delayed; and as I understand it, most of these operations are based on contractual relationships of some length. There may be some new ones that have come into existence or will come into existence in the interim.

But the point that I have to decide is, will these people be more damaged than will the government, which has very complex operations in this area. And if the statute is unconstitutional, then I can see where the government will have a myriad of problems and relationships to undo if this order goes into effect, whereas there will be very few which will go into effect based upon the new Public Utilities regulations because they haven't gone into effect yet.

That is all that this order does, would be to say to the Public Utilities Commission, "Stay it. Stay it for an additional period of time," and that will maintain the status quo, and I don't see any particular inequity in that.

I do conceded that if the government is in error, there will be a substantial period of time under which certain carriers, or all carriers, will perhaps be deprived of a [fol. 311] higher rate than they are now getting, and the government will be paying a lesser rate for that period of time, and to that extent there will be some financial loss to the carrier involved.

Mr. Phelps: Your Honor, I think there is one thing I haven't made clear.

The contemplation of the Commission, and I believe of the state law, is that where discretion as now embodied in

these new changes in the law, been launched in the Commission to determine whether or not rates for the transportation of government traffic shall be at less than rates for other kinds of traffic, it is contemplated that the carriers involved, and that is interstate as well as the government, can take appropriate steps to file the necessary representations with the Commission to seek authority to transport property at less than those rates.

So all the machinery has been provided to enable government traffic to move at less than minimum rates. Now, the only question now is——

The Court: (Interposing) Except that every contract that is now in existence is subject to revision, isn't it?

Mr. Phelps: Yes, that's right.

The Court: Then that is the basic problem, and that's the basic problem that the government seeks to avoid at this moment.

[fol. 312] Mr. Phelps: As of this time.

The Court: And if the statute is unconstitutional they are entitled to have it, is that not true?

Mr. Phelps: That's right. If the statute is declared to be unconstitutional, then they would be entitled to transportation at less than the minimum rates.

But I do have, Your Honor, coming back to the mechanics here—you see, there are five Commissioners. This is Friday afternoon. This order, by mere lapse of time and inaction by the Commission, will become effective next Sunday night.

The Court: Assuming it becomes effective and I have declared this stay order, can't they on Monday further stay this matter so that it is going to be no problem? I don't want to cause the Commissioners, and I haven't sought to cause the Commissioners any mechanical problem in this matter.

Mr. Phelps: As of next Monday, Your Honor, that will be some hours after the order becomes effective.

The Court: Well, so what? Can't they——

Mr. Phelps: (Interposing) I would assume that traffic would be moving in the meantime.

The Court: I know. But it's moving under current contracts. The carrier is protected by its current contracts.

Mr. Phelps: I don't know, Your Honor. I would suppose

that many carriers, when they start to move next Sunday [fol. 313] night, will be assuming they are moving under new rates. I don't know. That's the trouble.

The Court: I don't see that that makes much difference. In other words, they may think that they are going to be in a better position, but they haven't made their agreements to haul freight based on these new rates—at least, not a very substantial number of them.

Mr. Phelps: Then the action the Commission will take as of next Monday morning, some hours after the effective date, would mean that the Commission would have to convene, draft the necessary order and mail it out to these thousands of carriers. That would prove a mechanical—all that takes time.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Mr. Gillard, is there anything the government has to suggest in meeting the allegation of the physical difficulty of getting the order effective?

Mr. Gillard: I don't think the bogeyman exists as Mr. Phelps suggests.

As the Court suggests, regardless of what the Commission does on Monday, property will move.

The problem which arises thereafter is the problem of payment. I don't think the Court is under any illusion, nor is Mr. Phelps, as to how long the government takes to pay its bills. If property is transported early on Monday morning, and thereafter the carrier contemporaneously sub- [fol. 314] mits a bill for that transportation in accordance with the new rates set forth in the Commission's tariff, the government agency will receive it and thirty or sixty days after that they will pay it.

The Court: I don't think that is the point he is making, though. I think the point that he is making, Mr. Gillard, is that the carriers will enter into a relationship with the government to haul for the government in contemplation of the new rate.

Mr. Phelps: They maybe have. I don't know. I assume they have.

The Court: Well, they may have and they may not.

Mr. Gillard: I don't think that that's a valid assumption to make at all. Mr. Phelps says he assumes they have. The defense department on November 16th asked the Commission for a further stay on this matter. Obviously at that point the Defense Department hadn't instructed any of its agencies to enter into new contracts.

The Commission denied that new stay just on Tuesday of this week, and as soon as that happened the Defense Department then started to run to the Department of Justice and say, "What can we do about it?"

So I seriously doubt that any defense agency has been given instructions to enter into any new contracts.

But of course it isn't a new contract, anyway. As Mr. [fol. 315] Phelps knows, the rates are specified in the minimum schedule set forth by the Commission, and the tariff rates of the common carriers have to be based no lower than those rates. It isn't a matter of negotiation at all with the governmental agency who is shipping.

What Mr. Phelps was talking about was that apparently in the past the Defense Department thought that they could work out a new schedule of rates with the common carriers or the association of common carriers and that work would go forward. But that doesn't mean that that has become effective. I would suggest it certainly hasn't gone forward.

Mr. Phelps: Your Honor, there may be a serious problem here of what we may call an interregnum as to what is the proper rate to be applied. I would assume that if this Court's injunction is issued, of course it has the force and effect of law.

Now, the question might well be, what will be the lawful rate to be charged for traffic moving between 12:01 midnight, Sunday, and for some hours thereafter, or days thereafter, until such time as the matter can be adjudicated? I just don't know the answer, Your Honor.

The Court: However that may be, I guarantee the government doesn't get a free ride.

(Laughter.)

The Court: They will pay. I don't know what they will [fol. 316] pay. You may have a point that there will be an issue as to what rate is to be charged.

But the question is, is that problem sufficiently great to offset the difficulties that are going to face the government agencies which are dealing in this field and which have dealt on a pattern based on prior law, and now feel that the matter of constitutionality is such that this is an improper exercise of state power in the field where federal law should be supreme in the field.

Mr. Phelps: I am mindful, Your Honor, and I think I did mention those cases where the Supreme Court of the United States has said that the administrative remedies should be exhausted.

The Court: That I understand, and we use that quite often. Mr. Gillard should feel a little out of place in opposing that because that is one of his standard arguments, the exhaustion of administrative remedies, and it is used in all the government fields, and that may be very appropriate. And you may have a sound point that the government can't assert this position that it asserts until it has exhausted its administrative remedies.

But I think that is a matter to be disposed of by the three-judge court and not by me.

My point is, unless I would be of the opinion that it clearly stated no grounds for relief and therefore deny all relief [fol. 317] whatsoever and dismiss the matter, it seems to me I have to either maintain the status quo or dismiss the matter.

Mr. Phelps: Yes.

The Court: One of the two. And I don't think from the reading I have had of the complaint, or the proposed complaint, which I assume is the same as the complaint as filed, and I am quite sure it is, having read it, I think it does state sufficient to require a convention of a three-judge court and throw the inquiry by the three-judge court into the question.

Mr. Phelps: Yes, Your Honor.

The Court: Now, I think you have to agree with me that there is a point of constitutionality which must be reached.

Mr. Phelps: Yes, I do.

The Court: Now, what effect your claim of exhaustion of administrative remedies will have on that I am not pre-

pared to say, and I think it is one that should be given very careful consideration. But I don't think that answers the question of the temporary relief sought here.

So the question I want to ask you—and I might say to you without being cursory about it, Mr. Phelps, because I am happy that you have been here and expressed your opinion—what I want to ask you is, when do you want this [fol. 318] matter returnable, if you want it returnable, on a hearing of the interlocutory phases of the matter?

In other words, if I issue this, I think what you should do, I can set it down for a time certain and then you can consult with your department and then evaluate the matter more clearly. Then if you and Mr. Gillard, or the United States Attorney's office, want to get together on the time as to when you want this matter, we can then set down a time and determine whether or not I should dissolve this matter or have it go on until the three-judge court can hear it.

Mr. Phelps: We should like to be heard at the earliest possible time, Your Honor. Tomorrow morning.

The Court: What about the interlocutory matter, Mr. Gillard?

Mr. Gillard: The information I have on that is, as I told the Court, the department has requested the week of January 9th. On the telephone Mr. McConnell said that they will abide by any order the Court makes, and if it says three days, why, they will just have to get out here in three days.

The Court: I am not now talking about the question of the merits of the proceeding except as it goes to sustain the injunctive process here, because I am not, as a single judge, going to get into anything but whether or not I [fol. 319] should continue this restraining order as an interlocutory injunction until the matter can be heard by the three-judge court.

Now, I have prepared a request to the Chief Judge of this Circuit in accordance with the filing of this complaint for the convention of a three-judge court. That will be done as soon as it is convenient to do so, but I am sure it could not become effective, could not be done, until some time after the holiday season. I think that with the cal-

endars that are involved here that court couldn't meet before January anyway.

Now, I, as the judge before whom the application is made, in accordance with the statute can hear the injunctive phases of the case in so far as whether they are to be continued in effect until the three-judge court is convened. The only purpose of setting down any intervening hearing would be for that limited thing only, and I wouldn't get into the full argument on the question of constitutionality. If there is sufficient appears from the complaint and from whatever is before me, I would think that then I would—that then all I would hear is the argument on equities. That's all. Who would be most inconvenienced by this matter and where the equities lie on the question of whether or not the injunction remains in effect at that time.

And that is the only point on which testimony would [fol. 320] be taken. I wouldn't take it on any other question at all. That would be a special hearing.

Now, on that, I can set that down at different times. I have some flexibility. I do have a busy calendar next week. And I have one the following week.

Mr. Clerk, what about this?

(Discussion between Court and Clerk off the record.)

The Court: Now, as I take it, Mr. Gillard, I think you were talking about the hearing before the three-judge court?

Mr. Gillard: I think I was referring to the hearing on the interlocutory injunction. I am pretty sure that is what they had in mind, because of the necessity of bringing the people from Washington.

Even on this testimony as to the equities of the situation, they had in mind the necessity of getting testimony as to the nature and quantity of the movements, what would be involved in the event the restraining order would not continue in effect, and those things.

The Court: Well, I don't want to hold any more hearings than I have to. I have enough as it is in this matter.

I think what I had better do is this: I will issue the temporary restraining order. I will make it returnable—what did you say? What is the 20th?

The Clerk: The 20th is a Tuesday, Your Honor.

[fol. 321] The Court: How long would it take to hear

the equity matters on this? Do you think it would take more than half a day?

Mr. Gillard: I am a little bit at a loss to give you a direct reply to that.

The Court: What is your position on that, Mr. Phelps, realizing that this is a most rough estimate, and without attempting to make you commit yourself in any way that would be binding. I just want your best analysis at this time.

Mr. Phelps: Yes. Well, I should think, Your Honor, that I could say what I have to say on the matter of the continuance of the injunction or even on the matter of the merits within a couple of hours.

The Court: The thing is, the day we were talking about, we have a half a day at the most that we can carve out of that day. In order to get a full day, I would have to go pretty far over, and I think it is going to take a full day.

Mr. Gillard: I would assume that in order to fully explain to the Court what is involved and weigh the contention on both sides, Mr. Phelps alone would want about two hours, and I don't think the government could do it in less than that time with the burden on us.

The Court: Well, I tell you what I will do. Mr. Phelps, this is short time, and you haven't had very much time to prepare for this matter.

[fol. 322] What I will do, I will set down a time certain in accordance with the government's request, but upon request from you and notice to the government, and we will set the matter down on any calendar day you desire. I will hear you as to an argument as to an earlier date as soon as you are prepared to argue that matter, and you can be fully advised and prepare the matter. I will hear you any day next week on the shortening of the time.

Mr. Phelps: Your Honor, may I say this: I don't feel that I am perfectly prepared at the moment by any means, but we do consider the matter of serious importance.

The Court: Well, you may want to submit affidavits. You may want to do things of that kind which would augment the record.

Mr. Phelps: Yes. I would prefer it to be heard just as early as possible. I would even like to do it tomorrow, if possible.

The Court: Well, do you want me to set next Tuesday afternoon as a time to argue shortening time on the matter?

Mr. Phelps: Yes.

The Court: In other words, he wants to make a motion to shorten time on this thing, Mr. Gillard. I will set it down for the 9th of January now. Well, the 9th is a Monday. I will set it down for the 11th rather than the 9th. That is a better day. Monday is our law and motion day.

[fol. 323] I will set it down for January 11th, and I am going to give Mr. Phelps an opportunity, then, to make his preparation, and I will set down Tuesday; the 6th, in the afternoon——

Mr. Phelps: Of December?

The Court: Of December, yes, for your motion to shorten the time on that. And I will deem you have now orally made a motion to shorten time.

Then, Mr. Gillard, you be ready to meet him at that time, and it will give you a chance then to evaluate this thing, and better advise the Court of what your problem is.

Mr. Phelps: Yes. Very well, Your Honor.

There is one thing I am not quite clear on. I have not yet seen the restraining order.

Mr. Gillard: I am just concluding the time thing on here. That is at ten a. m., is it, Your Honor?

The Court: No.

Mr. Gillard: 9:30 a. m. on the 11th of January?

The Court: 2:00 p. m. Oh, yes, that would be on the 11th o January at 9:30 a. m.

Mr. Phelps: And do I understand, Your Honor, that you construe the order, which I have not yet seen, to mean that the Commission is to take immediate or all reasonably practicable steps to abate, so to speak, the effectiveness of that order?

The Court: I do. I do, yes. I don't want to be equivocal [fol. 324] about that at all.

I am going to do everything in my power to see that it is carried out.

May I have the order to show cause, Mr. Gillard?

We have to put the hour of the issuance of this restraining order, and I am going to play safe and issue it as of 2:55 p. m. today.

And, Mr. Phelps, in the meantime I am going to request Chief Judge Denman to convene a three-judge court in this case to hear the matter as to the permanent injunction.

Mr. Phelps: Yes, Your Honor.

The Court: You will be notified as to the members of the court and the time that that court will meet.

Mr. Phelps: Thank you, Your Honor.

[fol. 325] **Reporter's Transcript of Tuesday, December 6, 1955**

Colloquy Between Court and Counsel Re Hearing

Mr. Phelps: Good afternoon, Your Honor. I just wanted to say, Your Honor, I wish to withdraw my motion to shorten the time, the reason being that the action, which the Commission has taken, in carrying out to the best of its ability Your Honor's order, I think time is not now of the essence, and we are content now——

The Court: To hear the matter on the merits?

Mr. Phelps: To the 11th of January, yes.

The Court: That order that I have made is a temporary restraining order to show cause and an order to show cause why the temporary restraining order should not be ripened into an interlocutory or temporary injunction or preliminary injunction, and as to why a three-judge court couldn't be convened.

Now, I deem this to be a three-judge court matter.

Mr. Phelps: I'd assume so.

The Court: And I have already requested the Chief Judge of the Circuit to convene the three-judge court because I see no escape from that proposition. He has advised me that he will convene the court. That court, of course, will be composed of myself, one other district judge and a circuit judge. I have advised him the hearing is set for the 11th and that proceedings will take place on that day or some time immediately subsequent thereto.

[fol. 326] Now, what I would like to know, if it is necessary to have a hearing on the temporary or interlocutory injunction, would it not be wiser to have this temporary

restraining order made into an interlocutory injunction and to set the matter down for hearing before the three-judge court when it is convened, and it will be convened by the time I set for a firm date for the hearing, and proceed with the hearing on the merits.

Mr. Phelps: Well, Your Honor, what we had expected to do and what I am going to start to do at once is to prepare a motion to dismiss.

The Court: Oh, yes, you want to test that.

That, of course, would come before the three-judge court.

Mr. Phelps: I'd assume so, yes.

The Court: Then I suppose the thing to do would be just to continue this matter, your motion to dismiss come up before the three-judge court as soon as I am informed that it is convened, and have the names of the judges, and then I will set the matter down for the 11th for hearing, and could hear the motion to dismiss at that time.

Mr. Phelps: That is what I was going to suggest, Your Honor.

The Court: Is that satisfactory with you, Mr. Gillard?

Mr. Gillard: Yes. It is your idea a three-judge court [fol. 327] will be convened on the 11th?

The Court: I can have it convened by that time.

Mr. Gillard: Hear it on the merits as well as on the motion to dismiss?

The Court: I could have it on the 11th, or some date near thereto, which is convenient to all of the judges.

Mr. Gillard: That would then eliminate a hearing on the equities of continuing the restraining order.

The Court: He is not going to be concerned with that, as I understand it. His point now is he is going to prepare a motion to dismiss, he wants to have it argued and heard and determined.

Mr. Phelps: Yes.

The Court: And then if there are further proceedings necessary, to take such further proceedings as are necessary.

I take it that's your position, is it not?

Mr. Phelps: Yes, Your Honor.

The Court: I would deem that any motion which goes to the sufficiency of the pleading must be determined by the

three judge court. I only have the power to issue the injunction, or the temporary restraining order and the interlocutory injunction, and to ask for the convention of the court, and then to have the matter to be presented to the court.

Mr. Phelps: That's my understanding.

[fol. 328] The Court: I deem my power begins and ends there, and certainly I can have the court in session by that time.

I know, Mr. Gillard, you are concerned with the problem which follows, if any does follow the motion to dismiss, of getting your witnesses, having your counsel from Washington or from the department here, to present such matters as have to be presented to the court when it is convened.

Mr. Gillard: That's right.

The Court: Well, it would seem to me that the first step would be to hear the commission's motion to dismiss. I don't think that requires any witnesses; unless there are certain affidavits that should be presented. Of course, you can, in aid of your motion to dismiss, file certain affidavits.

I would like to have the matter ready for presentation to the court, however, as soon as possible. I don't just want to convene the court on a partially prepared proposition.

Mr. Gillard: I am thinking of this too, in that connection, if this is what Mr. Phelps has in mind, that in times set now in advance of when the motion is made and in advance of how much time will appear necessary for the government to answer that thing and make its necessary response, necessarily won't come within the time specified as January 11th.

The Court: "Necessarily won't," I don't know about that.

[fol. 329] Mr. Phelps, how long will it take you to prepare your motion and file it and file the necessary points and authorities and affidavits in support thereof?

Mr. Phelps: Well, when we decided upon that course, Your Honor, we thought January 11 would give us a comfortable time within which to do the necessary research and prepare the motion.

The Court: The reason I asked the question is that I would like to have as nearly as can be completed proposi-

tion in so far as the motion to dismiss is concerned to present to the court.

Mr. Phelps: Yes.

The Court: I don't want to place an undue burden on you, but I do want to expedite the matter as rapidly as possible to give the government a chance to prepare its response.

Mr. Phelps: Yes.

The Court: So that if there is anything further to be done, there will be a very short time, and then the court can act as rapidly as possible on that motion.

I have in mind if you want additional time I could give you time to prepare your motion, ample time, and so on, and then give the government time to respond and set a hearing date farther in advance, if you desire. Whatever [fol. 330] is convenient to meet your satisfaction, gentlemen.

Mr. Phelps: I should be pleased to present our motion to dismiss on January 11. If at that time you and your colleagues feel it desirable to give the government additional time to reply, I would understand that, of course.

The Court: Then we will just have to take it as it comes, Mr. Gillard. I think we will just have to leave this hearing for the 11th. As I understand it, Mr. Phelps is not going to raise any question as to time or as to the question of the injunction except in so far as the action should be dismissed. In other words, if we act favorably on his motion to dismiss that, of course, would terminate the injunction.

Mr. Gillard: May I suggest this, that we just leave it for January 11th as it is. The only thing, if it is set on the calendar before the court at the present time for the hearing before the three-judge court, and if Mr. Phelps then files his motion to dismiss and sets the time for that hearing and the government needs further time, or thinks it does, it can make the appropriate application to the court for it, that would necessarily change the date.

The Court: Then that will be before the three-judge court, and I am just simply attempting to expedite matters, but I see now this is a complicated question.

Mr. Phelps: Yes, it is.

[fol. 331] The Court: And you would need some time. I don't want to unduly press you in that field, so you make

your motion and we will consider that January 11th will be the date for which we set down for the hearing on the motion, and I'll have the court convened at that time; or if there is any change in that date, you will be advised. It will be a date in that near time, and you can have your counsel here then to argue that motion, Mr. Gillard.

Mr. Gillard: Thank you.

The Court: The court will be at recess.

[fol. 332] THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

Before: Hon. Dal M. Lemmon, Hon. Oliver J. Carter, and Hon. Oliver D. Hamlin, Judges.

No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

Reporter's Transcript of Hearing on Motions Before Three-Judge Court, Wednesday, February 8, 1956

APPEARANCES:

For the Plaintiff: Lloyd H. Burke, U. S. Attorney, by Lynn J. Gillard, Chief Assistant U. S. Attorney; E. Riggs McConnell, Esq., and John H. D. Wigger, Esq., Attorneys, Anti-Trust Division, Department of Justice.

[fol. 333] For the Defendant: Everett C. McKeage, Esq. and J. Thomason Phelps, Esq.

For Interveners: Arlo D. Poe, Esq.

Appearing as Amicus Curiae: Hugh Gordon, Esq.

[fol. 334] The Clerk: United States of America versus the Public Utilities Commission of the State of California.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Gillard: I would like to present to the Court Mr. John Wigger and Mr. E. Riggs McConnell, the attorneys from the Anti-Trust Division of the Department of Justice, who will be handling this matter on behalf of the United States—Mr. McConnell on your far left.

Judge Lemmon: Both sides are ready, are they?

Mr. McConnell: Yes, Your Honor, on behalf of the United States.

Judge Lemmon: Then we will hear from the plaintiff. The moving party is the plaintiff.

Mr. McConnell: Yes, the motion to dismiss.

Judge Lemmon: The motion to dismiss, yes.

Mr. Phelps: Yes. We had supposed, if Your Honors please, that the defendants having filed a motion to dismiss would go forward this morning.

Judge Lemmon: Yes, that would be proper.

Mr. Phelps: May I say, Your Honor, that we should like —I come to the question of time—I think it will take me at least an hour to lay out, to sort of lay out the problem, so to speak, and to go over some of the questions involved; and then we should like to request the court an opportunity for Judge McKeage, our chief counsel, to close.

We felt that we, as the moving party, could properly [fol. 335] request the right to open and close.

Judge Lemmon: We will allot an hour and a half to a side and you can divide the time as you choose.

Mr. Phelps: Thank you, Your Honors.

There are also questions, some motions for leave to intervene. I don't know the wishes of the court, whether you wish to entertain those motions as a preliminary matter or whether you would prefer that I go forward first.

The parties who have moved for leave to intervene are present, and I will abide by the court's wishes as to how to go forward.

Judge Lemmon: It is immaterial to us. You can present that now, if you wish.

Mr. Phelps: It might be possible, Your Honors, for the parties who have moved for leave to intervene to make their representations now.

Judge Lemmon: Very well.

Mr. Poe: My name is Arlo D. Poe. If the Court please, I have filed a motion for leave to intervene on behalf of some, I believe, 34 highway common carriers operating in California under certificates of public convenience and necessity issued by the defendant, Public Utilities Commission.

The ground upon which this motion is made is that these common carriers are directly interested and directly af- [fol. 336] fected by this proceeding, and are of the class of carriers whose rates are involved in the application of the section of the Public Utilities Code, that is, the constitutionality of which is raised in question in this proceeding.

Judge Lemmon: Aren't their rights adequately represented by the Public Utilities Commission?

Mr. Poe: Yes. We do not present the motion on the theory that the Public Utilities Commission is not capable of——

Judge Lemmon: (Interposing) I don't mean that. I mean, wouldn't the rights of the common carriers be adequately protected by the Public Utilities Commission?

Mr. Poe: I dare say they would, Your Honor; but it would appear that because of the peculiar position of these common carriers that they are persons, corporations, who could well have been made parties and are proper parties to the proceeding in the first instance as defendants, and having a direct interest in the outcome of the proceeding, and there is attached to the motion and notice of motion a proposed answer setting forth the interest that these carriers have and what they seek to have established in this proceeding, to wit, that the section under attack is a constitutional exercise of regulatory power by the State of California.

Judge Lemmon: Do you wish to submit your motion upon the moving papers or do you wish to augment it by an argument?

[fol. 337] Mr. Poe: No, I do not wish to augment it. I am willing to submit it on the documents I have filed.

Judge Lemmon: All right. Do the other parties to this lawsuit wish to be heard in connection with this motion for intervention?

Mr. McKeage: We have no objection to the granting of the motion to intervene.

Mr. McConnell: May it please the Court, the United States recognizes, of course, the pecuniary interest of the motor carriers in this action, and we have no objection to the intervention.

I don't think it would be inappropriate to state that essentially this is a constitutional question between the Commission and the United States, and in general we would like to keep the thing rather in that orbit than otherwise, but we have no objection to the motion.

Judge Lemmon: The motion will be submitted.

Mr. Gordon: Your Honors please, my name is Hugh Gordon. I have filed a motion for leave to appear in this proceeding as a friend of the court.

The motion was filed on behalf of California Manufacturers Association and, as stated in the motion, that association comprises in its membership some 1000 of the leading manufacturers and shippers and receivers of freight in California, so they are likewise directly interested in the issue presented.

[fol. 338] Judge Lemmon: Are you prepared to submit your motion on the written papers?

Mr. Gordon: Yes, I have prepared everything that I am prepared to state.

Mr. McConnell: May it please the Court, with respect to the motion for leave to appear amicus curiae, of course that is for Your Honors, and the Government does not want to have anything kept out that will help resolve this thing.

We are a little bit troubled about the fact that possibly a brief that would come in connection with this motion, after the submission of the motion or something of that sort, the Government not having a chance to reply, that would be somewhat prejudicial to the Government's views.

We have no objection to both the parties here briefing the matter in that regard. We feel, however, that we should have a chance to reply to any subsequent briefs on this particular motion.

Judge Lemmon: You have no objection to how many players there are on the other team but you want to have the last chance at bat, is that it?

Mr. McConnell: Well, I don't say that we want to have the last chance at bat, but we want to get to bat as long as possible.

Mr. McKeage: May it please the Court, the defendant has [fol. 339] no objection to the motion to appear as a friend of the court.

Judge Lemmon: Now we will proceed with the motion to dismiss.

ARGUMENT BY MR. PHELPS

Mr. Phelps: I am J. Thomason Phelps, counsel for defendant and the moving party.

May it please the Court, we have filed here what I am afraid is a rather formidable memorandum of points and authorities in support of our motion. I hope the Court has not been too dismayed by the size of it. I can only say that in view of the importance and the complexity of the matters involved here, we believed a rather long brief was inevitable.

I should say, too, that more than half of this document that we have here before us consists of an appendix of reference material.

In that appendix we have set out a number of decisions of the California Public Utilities Commission, certified copies, of which this Court may take judicial notice.

We have set out certified copies of certain other public documents, one affidavit and certain excerpts from other various Federal and State statutes for reference material.

We have tried to be scrupulously careful to support by admissible, proper, legal evidence, all of the statements of fact which we have set out in our memorandum. I believe we have done that with one exception which I will mention later, and I will cure that exception by offering here [fol. 340] today the proper certified documents, so that when we have concluded I think I can say that the Court

will have before it the proper evidence of all the statements of fact contained in our memorandum.

I regret to say that the Government has not been so careful. I think it will appear upon a reading of the Government's brief that there are throughout it a number of statements of fact in addition to and outside of the complaint, in addition to and outside of the affidavits filed in support of the complaint, which are matters not of common knowledge and which are therefore objectionable.

We considered preparing a motion to strike those statements of fact, but we concluded that we do not want to burden the Court with another motion. We will do so if the Court wishes. But we should like to have it understood that our failure to object in detail to each of these objectionable, unsupported allegations of fact, we hope will not be construed as an acquiescence, and that throughout there is good reason to think that many of them are inaccurate.

Now, before coming to the issues and the questions of law involved here, I should like to describe as briefly as I can, unless the Court prefer I should proceed otherwise, some of the matters and events that led up to this complaint. I believe that a consideration of those matters is necessary to a proper understanding of the questions of law and the [fol. 341] issues involved in this case.

The first thing I would like to do is to describe briefly the statutory and the administrative framework within which carriers of property in California are regulated under California law by the California Public Utilities Commission.

For our present purposes I think we can consider two categories of carrier. And for the present purposes, this is not wholly accurate and complete for all purposes, but for present purposes I think I can describe these two categories in this way:

One of them I will call the certificated carriers. They are motor vehicle carriers. They have operating authority granted by the Public Utilities Commission in the form of a certificate of public convenience and necessity. Those carriers are regulated under the so-called Public Utilities Act in California. They are required to file tariffs with the

Commission, and they are required by law to charge no other than the tariff rates, with certain exceptions.

Generally speaking, the certificated carriers are the large carriers. I use that word loosely. But generally that is true. The larger carriers, and they are somewhat more firmly established financially than the others. The State of California commenced regulating the certificated carriers back in 1917.

[fol. 342] The other category of carriers are what I will call permitted carriers. They form a very large group. They number thousands in California.

Speaking generally again, they are rather the smaller carriers, less firmly established financially. They are regulated in California under the so-called Highway Carriers Act, and have been so regulated since 1935, much more recently than the certificated carriers.

Now I should say, too, that rails as carriers in California are regulated exactly the same or virtually the same as the certificated highway carriers, and hereafter when I use the word "certificated carriers" it should be understood as comprehending also the rails.

So that we have the rails or certificated carriers on the one hand, operating under tariffs under the Public Utilities Act, and then we have the so-called permitted carriers operating under the permits granted by the Commission and under the Highway Carriers Act.

The rates of the permitted carriers are also regulated by the Commission but in a different way. The permitted carriers are not required individually to file tariffs containing their rates. The Commission is empowered by law in California, and has in fact established from time to time a structure of minimum rates which these permitted carriers are required to observe.

[fol. 343] Now, although we have these two different categories, and although they have certain differences for regulatory purposes, they compete with each other very vigorously for all kinds of traffic. For a long time there has been in the Public Utilities Act governing certificated carriers, until a year ago, a provision the substance of which was, in effect—the effect of which was to confer upon the certif-

cated carrier an unlimited privilege to transport property for the United States at free or reduced rates.

There has been a long-standing policy of the Legislature, apparent in the Highway Carriers Act, to equalize the conditions under which the certificated and the permitted carriers compete with each other. And so there has been a provision in the Highway Carriers Act permitting the permitted carriers to meet the rates of the certificated carriers.

The Commission, in carrying that legislative policy somewhat further, for many years had established as one of its minimum rate orders—minimum rate order No. 2—a provision, namely item 29, which conferred upon the permitted carriers unlimited—the effect of it was to confer unlimited authority upon the permitted carriers to deviate from the minimum rates in the transportation of traffic for the United States Armed Forces.

That provision of the Public Utilities Act governing the certificated carriers, to which I have referred, giving them [fol. 344] the privilege of hauling traffic at reduced rates for the United States, was contained for many years in what is now Section 530 of the Public Utilities Act, about which we will hear a great deal more.

Now that, if Your Honors please, is the statutory and administrative framework under which regulation of these carriers in California has proceeded for many years.

Now I should like to describe, if I may, a rather long series of events which led up to this present complaint.

I think I can properly pick up this history with the date June 3rd, 1954. I won't say that is an absolute beginning, but that is a convenient place with which to commence this history.

On June 3rd, 1954, a petition was filed with the California Commission by a group of carriers organized into an unincorporate situation who called themselves the California Government Traffic Conference. They represented themselves as being engaged in the transporting of substantial quantities of government traffic. I should like to quote certain excerpts from that petition which was filed with the California Commission.

> "Certain permit carriers have taken liberal and literal advantage of the equal opportunity to compete freely

from a minimum rate standpoint for the movement of competitive government shipments. In doing so they [fol. 345] have driven rates for the handling of such Government shipments to a depressed and unreasonably low and unlawful level."

Mr. McConnell: Will you excuse me, Mr. Phelps? I don't want to interrupt.

Your Honors please, since comment was made on our brief, that in our brief, which was ostensibly and patently stated on its face before this whole proceeding, we put the thing on a rather broad basis.

Of course none of this information is traversed strictly by the motion filed or our complaint. We do not wish in any way to cramp Mr. Phelps' style or keep anything apart. However, we would like to suggest that rhetorical matter and matter of that sort be used sparingly. This is not in the record before the Court.

Mr. Phelps: May I assure the Court, I do not have any rhetorical purpose in making this material available to the Court. I think it will appear that it is extremely important and relevant to some of the issues that are raised in this proceeding.

I am about to give—this is the first step in the history of the proceedings before the Commission, proceedings which ultimately terminated in this complaint.

"Your petitioner is informed——"

Continuing the quote:

[fol. 346] "—and believes, and upon such information and belief alleges, that the Government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic. That the public interest and the preservation of a sound minimum rate structure requires that such practices be stopped."

In that petition, the California Government Traffic Conference requested certain relief of the Commission. They requested that hearings be held; that evidence be taken, and the specific relief requested was that this item 20 to which I have referred be eliminated from minimum rate tariff No. 2.

Now, let me explain what the effect of that would have been. Item 20, as I have said, is that provision of the tariff the effect of which was to confer upon permitted carriers unlimited authority to deviate from minimum rates governing government traffic. If that provision were eliminated in its entirety, the effect would be that thereafter permitted carriers would be required to assess and collect [fol. 347] the minimum rates, which are presumably at a somewhat higher level, for the transportation of government traffic.

It is easy to see that that would have put the permitted carriers at a certain disadvantage in competing with the certificated carriers. They would be in the position of being bound by law to collect these minimum rates, whereas the certificated carriers would still have their right to charge whatever they could negotiate with the United States.

Apparently in recognition of that inequality of result that would follow from that granting of such relief, on June 17th, 1954, the petitioner filed an amendment to its position with the Commission. In that amending they withdrew their request that item 20 be eliminated and substituted another request, the effect of which was to ask the Commission for authority to the permitted carriers to meet the rates of certificated carriers that were on file with the United States.

Now, let me emphasize that a bit. On file with the United States.

The practice apparently had been that certificated carriers, and others as well, in negotiating for traffic of the United States, filed with the United States from time to time reduced rate quotations. Those were not public. The [fol. 348] permitted carriers were seeking authority from the Commission to meet those rates of the certificated

carriers which had been filed with the government traffic officers.

On September 2, 1954, there was a pre-hearing conference held by the Commission for the purpose of discussing some of the matters raised by that amended petition. Present at that pre-hearing conference, among many others, was Mr. Clement Mayo, an attorney representing the United States Government. On November 3rd, 4th and 5th—three days—public hearings were held before the Commission. Mr. Mayo was an appearance at those proceedings.

On January 25, 1955, the Commission issued a decision upon that petition. The decision contains an opinion in which a number of statements were made, but it contained no order that had the effect of changing any of the status quo. It recognized, however, the problem that was involved and recognized the need for taking steps to correct it.

That opinion is set out in our appendix.

It recognized, however, that in order to make available to these permitted carriers the relief that they sought, the permitted carriers were going to somehow have to be in a position to know what these rates were that had been filed with the United States. So long as they were secret there was no way they could find out about them. And the Commission felt that there was nothing they could do, of course, [fol. 349] to require a disclosure of those rates.

And so it suggested in that opinion that the matter might be corrected if the United States traffic officers or the United States Government ultimately, should require the publication of these reduced rate quotations and the filing with the California Commission, a simple matter, before giving the business to the carriers filing them.

In effect, therefore, the Commission held in abeyance the whole matter and suggested that solution.

On March 11th, 1955, there was another petition filed by the California Government Traffic Conference in which they asked the Commission to reconsider or modify or to grant a rehearing with respect to that earlier decision. And I should like to quote certain excerpts from the petition which they filed at that time. Quote:

"Your petitioner has been unsuccessful in its endeavors to cause the Armed Forces to give such notice

> to your Commission, and your petitioner has been informed that the Armed Forces do not feel it is appropriate for them to give such a notice to your Commission and that they will not give such a notice to your Commission."

I may say to Your Honors that the United States later changed its mind. I refer now to a letter contained in our appendix from the Secretary of the Navy.

[fol. 350] Excuse me, it is not a letter, it is a petition filed at a later time and so which I will consider in a moment.

In that petition, however, the following appears:

> "That the Department of Defense believes that rate quotations of carriers for account of the Armed Forces should be filed with your Commission, and thereby throw the light of day on the level of the circumstances surrounding the establishment of such rates and charges."

That was dated August 26th, 1955.

But back in March the Government apparently preferred this aloof attitude and felt that it could not properly require the carriers doing business with them to file their rates with the Commission.

On May 3rd, 1955, the Commission granted a rehearing that had been requested by the Traffic Conference that I have described, and said that the hearing would be held at such time and place as would be hereafter designated. Again the matter was held open. Presumably the Commission recognized the futility of any effort made by it alone to remedy the situation.

Now let me briefly recapitulate the events to this point:

We have an attempt made by a body of carriers transporting a large body of traffic in California, reciting the [fol. 351] conditions prevailing, the hardships, applying to the California Commission and seeking relief from those conditions. Conferences held, hearings held, interested parties participating. The Commission recognized the problem, found the problem existed, suggested a solution, a solution that depended upon the cooperation of the United

States Government, that cooperation was not forthcoming, the whole matter was a futility.

In that state of affairs the California Legislature acted. It amended Section 530 of the Public Utilities Code in such a way that upon the effectiveness of the amendment the certificated carriers would be free—strike that. The certificated carriers would lose the privilege of negotiating reduced rates with the United States Government. But the withdrawal of that privilege by the Legislature on the one hand was qualified by a restoration of the privilege with the other hand, but on certain conditions.

Now, let me explain that.

The effect of that statute was this: The Legislature said, "Hereafter certificated carriers shall not have an unlimited privilege to charge reduced rates for government traffic. They shall be able to charge reduced rates upon being authorized by the California Commission.

"But," said the Legislature, again having in mind the desirability of equalizing the competitive conditions between [fol. 352] the permitted and certificated carriers, the Legislature said that the certificated carriers would be free to meet the rates of any other carrier for government traffic.

That statute was to become effective on September 7, 1955.

On August 16th, 1955, the Commission acted to implement that clearly expressed policy of the Legislature and issued a decision which cancelled unequivocally item 20 of Minimum Rate Tariff No. 2. That cancellation likewise was to become effective contemporaneously with the statute, namely, September 7th, 1955. Plainly, the attempt there of the Commission was to withdraw the privilege now from the permitted carriers so that the effect of the Commission's decision, had it become effective, would have been to remove the unqualified privilege in all carriers and to permit reduced rates only upon being authorized by the Commission.

On August 25th a further public hearing was had upon this petition of the California Government Traffic Conference to which I have referred. Mr. Mayo was again present at that proceeding.

On the following day, August 26th, the Department of Defense requested a 90-day postponement of the effectiveness of the cancellation of item 20 in the tariff. And I should like to quote briefly from a petition which they filed with the Commission on that date.

[fol. 353] "The Department of Defense is conducting negotiations with California traffic agencies to modify rate tenders in such a manner as to make them acceptable to the Department of Defense, and it is believed that differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated, the Government is opposed to decision No. 51832 becoming effective."

I will paraphrase:

"If decision No. 51832 becomes effective September 7, 1955, after said date and until acceptable permitted carrier tenders are formulated and, where necessary, approved by this Commission, military traffic of necessity will have to be transported by common carriers regardless of the adequacies or inadequacies of their services and the reasonableness of their tariff rates."

The petition concluded with this prayer:

"WHEREFORE, the Department of Defense respectfully urges that your Commission postpone the effective date of decision No. 51832 for a period of 90 days or until: (a) acceptable rate publications of permitted carriers [fol. 354] setting forth the actual rates to be charged the Government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the government traffic pattern, which are acceptable to your Commission."

Nothing could be plainer than the fact that at that point the Department of Defense was intending to go along with the solution that the California Legislature and the Commission had proposed. They merely sought a postponement of the date when that new program would become effective.

On September 6th, the day before the statute and this decision of the Commission were to become effective, the Commission did issue a new decision which in effect granted the 90-day request of the Department of Defense, and in effect provided that the cancellation of item 20 would become effective on December 5, 1955.

I should like to quote from that decision:

> "In order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense, and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended."

[fol. 355] That's the reason given for the Commission's postponement.

Judge Carter: Mr. Phelps, you are not making any contention here that anything that the Public Utilities Commission of California could have done or that any acquiescense that an officer of the United States might have made in any proceedings that were before the California Public Utilities Commission could in any way cure a constitutional infirmity in Section 530, if there is one?

Mr. Phelps: No, Your Honor. My purpose, however, is this: I think that these matters are important as affecting the equities. Having in mind the injunctions of the Supreme Court that the relationships between the State and Federal Governments are a delicate affair, I submit that these matters do affect these equities.

Judge Carter: Then you are doing that *only* to go to the equities involved there and the balancing of them?

Mr. Phelps: Yes. Now, on November 21st the Department of Defense requested a further 60-day postponement. On November 29th the Commission denied that request, in a decision from which I will quote:

> "The Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed [fol. 356] to the Commission for its consideration.

"The intent of the Legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable."

The Commission plainly at that point was contemplating that there would be applications made thereafter by carriers after negotiating with the Government for permission to charge reduced rates, and plainly indicates a receptivity to such applications.

Now, let me recapitulate this briefly to this point:

Here, after many months of notice to all interested parties, public hearings, the stage was set for a new look at the transportation of government traffic in California, the new look being that thereafter when carriers sought to charge reduced rates they must obtain authority from the Commission.

December 5th, the date when this program was to become effective, was a Monday. It was to go into effect at 12:01 Monday morning. I think even the minutes here are important because of what will appear to be the immense [fol. 357] volume of this traffic that was moving, I think it is fair to assume, constantly.

On Friday, December 2nd, the preceding Friday in the afternoon, this complaint was filed requesting injunctive and declaratory relief.

Now, it is very important, Your Honors, to notice that in this complaint there isn't a single word indicating that the Commission has done anything, has issued any order, or has threatened to issue any order, or has done anything adverse to the United States. Not a word. I have combed it with great care looking for it and I haven't found it.

On the afternoon of that Friday, December 2nd, Mr. Lynn Gillard, acting for the United States, appeared before Judge Carter and presented the Government's application for a temporary restraining order. After describing the contents of the complaint and the proposed restraining order, Mr. Gillard had certain further representations to make which I should like to quote:

"The Public Utilities Commission has by order implemented this section 530 of its Public Utility Code, and that order is to take effect at 12:01 a.m. on Monday, December 5th, so that if action is not taken as of today the section will be in effect as of a minute after midnight on Sunday."

That is a quotation from the transcript.
[fol. 358] Obviously Mr. Gillard was referring to the decision of the Commission which had postponed until December 5th the cancellation of item 20 of the tariff.

At that time Judge Carter had courteously made it possible for the defendant to appear at the time of the application for the temporary restraining order. I did appear, and I explained as best I could with my then limited knowledge of this affair, that there was an order, in fact a series of orders of the Commission outstanding, and that merely by the lapse of time and the inaction of the Commission this program was going to go into effect.

Now, it will be noted and it is very important to note, Your Honors, that the injunctive relief requested by the Government and the injunctive relief that appears on the temporary restraining order issued by the Court is merely prohibitory in form. It merely restrains the Commission from doing certain things. And when I pointed out that merely inaction and the lapse of time would make it possible for all these consequences which apparently the Government was trying to arrest, it was then that Judge Carter interpreted the restraining order to require the Commission to take affirmative action to countermand this action which it had taken.

And so on December 5th, in the afternoon, as promptly as it was possible to arrange it, the Commission of Cali-
[fol. 359] fornia convened itself and signed out a new order which, in effect, postponed until the determination of this case the cancellation of that tariff provision, the Commission intending to carry out to the best of its ability the orders of this court.

Thereafter, on December 22nd, the defendant filed its motion to dismiss.

There are two principal grounds for the motion: 1, that this Court lacks jurisdiction over the subject matter of the complaint, and the second, that the complaint fails to state a cause of action.

Judge Carter: In federal parlance, a claim for relief, is that right?

Mr. Phelps: A claim for relief, that is correct, Your Honor. I accept your correction.

In support of its first ground, the defendant sets out seven reasons for its position that this court has no jurisdiction.

The first is that the complaint fails to describe or allege an actual controversy between the plaintiff and the defendant as required by that section of the code 28, United States Code 2201, providing for declaratory relief. And so the first question before this court is whether or not the complaint does describe a controversy.

The second question is whether the plaintiff has failed to exhaust an administrative remedy available to it in a [fol. 360] proceeding before the Commission.

Judge Hamlin: Counsel, may I ask, do you intend to argue these positions that you make rather than stating them? I think we have all read your brief.

Mr. Phelps: Thank you, Your Honor. I will be pleased to refrain from any further description of the questions.

I will take up first, then—and I see I must hurry along—the question of whether or not an actual controversy is described.

I have already indicated that the complaint said nothing about any action taken by the Commission, actual or threatened. The Commission is the only defendant before this court. The complaint alleges merely that the Legislature of the State of California amended Section 530 of the Public Utilities Code, and that certain consequences would follow if that section became effective. That is the whole of the complaint, the substance of it.

So we say, Your Honors, that the complaint is fatally defective for the purpose of stating a case for declaratory relief in that it fails simply to describe any controversy whatever between this plaintiff and this defendant.

Now, what of, "The plaintiff has failed to exhaust an administrative remedy"?

This depends on whether or not this court considers the proceeding before the Commission and the order issued [fol. 361] by the Commission, which was finally nullified as a result of this court's restraining order. I don't believe the defendants, Your Honors, should be called upon to decide whether it is or is not. We shall take it in the alternative.

If there is no commission action whatever before this Court for its cognizance, then our first ground that there is no controversy described is fatal to the plaintiff's case. On the other hand, if this court does take cognizance of the fact that there were prior proceedings before the Commission, then we say that this plaintiff had an opportunity to pursue before the Commission the relief which it sought, and, as we have set out in our brief in detail, it is clear that the United States, if it had sought to take appropriate action before the Commission, could have stayed this whole program, this new rate program, could have stayed the effectiveness of it until the matter of the constitutionality of the Commission's action had been passed upon by the United States Supreme Court.

The United States chose not to do that. It elected not to pursue that administrative remedy. But surely its having a remedy and failing to exercise it puts it in no better position than it was if, one, administrative remedy was still available.

So we feel, Your Honors, that if cognizance is to be taken of the Commission's action, that action could have [fol. 362] been reviewed before the administrative tribunal and ultimately by the United States Supreme Court, and that is the remedy which this plaintiff has failed to exhaust.

The next question I should like to take up is whether or not the complaint alleges a matter which is within the primary jurisdiction of the defendant Commission.

There is a well known body of cases which sets out this so-called principle of primary jurisdiction. Briefly, it is where there is involved a matter calling for the expert determination of a trained administrative body, that those

matters should be passed upon by the administrative tribunal.

Now, we have such a matter as that here, Your Honors. The complaint alleges on page 5, in talking about government traffic:

> "Since time would be of the essence, it would be impossible to obtain Commission approval of rates and accordingly shipment by the United States would be thrown into the class rate, which, as applied to such shipments, is recognized as unrealistically high because the density, volume and other characteristics of such shipments would normally entitled them to rates equivalent to the commodity rates negotiated by commercial concerns."

There I submit, Your Honors, is a matter calling for a determination of the question of whether or not the rate [fol. 363] structure presently established by the Commission is unrealistically high.

The plaintiff in its brief has brushed aside this question of primary jurisdiction, apparently without being aware of the fact that they have asked this Court to determine a question calling for an administrative determination.

The next matter is whether or not the Johnson Act is a defense here.

The Johnson Act, as is well known, sets out certain conditions which, if fulfilled, prevent the District Courts from issuing any injunctive relief against a rate order affecting a public utility issued by a state or by an administrative agency.

Again we have the question of whether or not we have an order before this court. As I say, the defendant will not resolve that question. We take it, again, in the alternative. If an order is before this court, all the conditions of the Johnson Act are fulfilled as we have set out in our brief.

In that state of affairs, and after the events I have described involving Mr. Gillard's representations to the court, and the background of the issuance of the restraining order, you can imagine my astonishment, Your Honors, when I read in the government's brief on page 15, quote:

[fol. 364] "The Johnson Act has no bearing on the instant action. That act prohibits under certain conditions federal injunctions against any order affecting rates chargeable by a public utility and made by a state administrative agency. No such order is even remotely involved in this case. The relief sought by the Government is directed against a statute, namely, the amendment to section 530."

Now you can see, Your Honors, the horns of the dilemma upon which the plaintiff has impaled itself. If we had an order dismissing the cause, the Johnson Act and the principle of exhaustion of administrative remedy is a prohibition against this court entertaining jurisdiction.

If the order is not before us, if we are confined merely to the four corners of the complaint, then there is no controversy stated.

I will leave that to the Government to resolve.

Our brief shows the ways in which the other grounds set out in the Johnson Act are fulfilled here. I will refer to only one and that is the question of whether or not the Commission's order interferes with interstate commerce.

The Government in its brief makes a great deal of the fact that the action of the California Legislature and the Commission interferes with interstate commerce. But the complete answer for present purposes, Your Honors, is this: [fol. 365] The Public Utilities Act and the minimum rate order No. 2 by their own terms are restricted to intrastate commerce, so that whenever and in whatever forum the United States can establish the fact that the property involved is property moving in interstate commerce we have no problem so far as the Commission is concerned because the State statute and the Commission's tariff don't purport to affect interstate commerce. What we have concerned here is a large volume of intrastate commerce, and it is that residue or larger issue that we are concerned with here today.

I see my time is up, Your Honors. I regret—I will of course desist if Your Honors wish me to. I wanted—

May I take a moment to consult with my associate, Judge McKenzie, as to how we should divide our time?

Judge Carter: Yes.

Mr. Phelps: Judge McKeage has suggested I take ten minutes more. I will try to hurry.

The next question is whether or not there is irreparable injury to this plaintiff in the absence of any injunctive relief by this court.

The essence of the complaint is that unless this court enjoins this new rate program of the State of California, that it will have to pay more money for its transportation. That in effect, Your Honors, is the essence of the government's case, it's going to have to pay more money for [fol. 366] transportation.

But we have outlined in our brief the ways in which that question could have been resolved through the administrative process, ultimately to the United States Supreme Court, without coming to this court for an injunction.

There is a second way in which the whole case of the Government could have been raised and its interests fully protected without coming to this court, and that is by simply setting up the actions at law, all of the defenses it raises here, when, as and if actions are brought by carriers to collect the minimum or the tariff rate.

That is set out in our brief. I will not pause over that.

We have also outlined how, if this injunction continues, irreparable injury will be suffered, as it is presently being suffered by not the United States but by the carriers, who, had this court's restraining order not issued, would now be able to assess and collect the minimum rates, which are at a higher level than the reduced rates being charged the Government. They have forever lost that right to charge those higher level of rates since last December 5th, and will continue to be deprived of that right so long as this court's injunction continues.

Judge Carter: Mr. Phelps, isn't that an admission that the effectiveness of the Commission's order and the statute [fol. 367] will have the effect of increasing the cost of transportation in intrastate commerce?

Mr. Phelps: I think it does. I think that's conceded.

Judge Carter: As a matter of fact, if that is true, even assuming that is true.

Mr. Phelps: Yes, Your Honor.

We also advert to the matter of comity, and I would like to have time to elaborate upon that. Time does not permit. But I wish in all seriousness to urge upon this court the importance of the doctrines laid down by the United States Supreme Court in which they speak——

Judge Lemmon: You covered that adequately in your pleading, didn't you?

Mr. Phelps: Very well, Your Honor, I will pass that by, too.

The defendant hopes that this court will never reach in this proceeding the ultimate question involved, namely, whether or not the State of California can lawfully regulate rates of carriers carrying government property. But if it does, even on that question the defendant submits that the law is on its side. We have relied on the so-called Penn Dairies case, which I have set forth at length in our brief, and on the so-called Hughes Transportation case, which we have also set out in detail. The Government in its brief has sought to discredit both of those cases and to distinguish [fol. 368] them, I submit unsuccessfully.

In its treatment of the Hughes case it says there was a motion granted by the court to reconsider that case, and that the whole matter had been opened up. I have obtained, Your Honors, and I should like to offer here today, a certified copy of the motion filed by the United States in that Hughes case and a copy of the court's judgment thereon. I think it will fully appear—I will supply that in just a moment. I think it will fully appear, Your Honors, from this motion that the questions of law announced by the court in its decision, which we have cited, the court was not retreating in the slightest from the propositions announced there. The motion to reconsider was granted solely for the purpose of hearing evidence upon certain matters of fact.

Mr. McConnell: You also have the order reopening the case?

Mr. Phelps: Yes, I do.

Mr. McConnell: With that we have no objection. I think both of them should be offered.

Mr. Phelps: Yes, I have that and will supply it to the court.

Judge Carter: Do you desire to offer it in evidence?

Mr. Phelps: Yes, I do, Your Honor. I am trying to find among my papers here the court's order. It is present here. I should like to lodge it with the court.

[fol. 369] Judge Leinmon: If there is no objection, it will be received.

Mr. Phelps: I won't try to go over all the Government's brief in detail. I think I can fairly say that the Government's case rests in its entirety upon what it alleges to be military necessity. I wish to assure this court that the State of California and the Commission are keenly aware of the importance of maintaining the Armed Forces, the military establishment, and has no desire to undermine the security of the United States.

But we do object, Your Honors, to this perpetuation of a chronic state of alarm which is all too apparent in the brief filed by the Government. They would have us think that we are on the verge of a conflict, that we must throw a mantle of secrecy over these operations. There are specters of fear and anxiety that stalk throughout all the pages of the Government's brief.

Let me give you a few phrases. The word "crisis" appears. "Emergency." "Time is of the essence." "National security." "Potential enemy." "Atomic bomb." "Vital information." "Extreme secrecy." "Intelligence agents of foreign powers." "Vital targets for air attack." "The battle of the Marne." "Dunkirk." Even the ghost of Stonewall Jackson is invoked to persuade this court that it must be careful about interfering with the operations of the mili-

[fol. 370] tary establishment.

I don't think, however, that this court will be intimidated or frightened into a trampling of local interests in the name of alleged military necessity.

Thank you.

Judge Leinmon: We will take the morning recess.

(Short recess.)

ARGUMENT OF MR. MCCONNELL

Mr. McConnell: May it please the Court, mainly we will rely on our brief for the opposition with respect to the

motion to dismiss for lack of jurisdiction over the subject matter.

I think that when it is borne in mind that the United States in this case solely contests the constitutionality of any State statute which subjects the rates for the carriage of its property to Commission approval and any State Commission's rate process, the defendant's position on its motion will vanish. Since it is a question of the constitutionality of the statute and the Commission cannot decide that question, obviously there is no question of exhaustion of administrative remedies.

Secondly, since there is a question of constitutional law and Federal Constitution, obviously that is not a question of primary jurisdiction of the State Commission.

Thirdly, since it is just purely a question of the constitutionality of the statute, obviously the Johnson Act has no application. We could elaborate on the history of that act [fol. 371] and the purpose of it, but it applies only to actions brought to set aside rates, or rate orders of the Commission. We are not attacking that. We are raising a controversy on the statute, as to whether or not that is constitutional.

Judge Carter: Well, is that a controversy?

Mr. McConnell: Whether or not the statute is constitutional?

Judge Carter: Between the Government and the Commission? Between the United States and the Public Utilities Commission is there a case in controversy before this court if what you say is true?

Mr. McConnell: We submit, Your Honor, there certainly is. There is one, the primary purpose for which this court was constituted, and that is the constitutionality of a State statute.

Judge Carter: But the question I am raising is, is the Public Utilities Commission the agency to be sued to establish that?

Mr. McConnell: If Your Honor please, ever since Ex Parte Young—we didn't elaborate on that. If you can go back to the case we cited, Hunt versus United States, where the United States brought an action raising the question

of the regulation of state tariffs, you will notice there that action was brought against the Government of the State by the United States, and the defendants argued there that that [fol. 372] was not a proper action, that it fell within the Eleventh Amendment, and that accordingly the action was improperly brought. It was a suit against a state.

Now, ever since Ex Parte Young, which is way back in 283 U.S., or something of that sort, it has been firmly established that suits to enjoin the administrative agency which had the responsibility of carrying out the statute was a proper way to bring an action to test the constitutionality of the statute.

I think if you will look, the thing has been considered so well settled that it hadn't been raised recently since Ex Parte Young. You will notice in one of the cases we cited, which we state on page 17 of our brief, Query versus United States, that was an action brought against the tax collector of South Carolina to enjoin him from enforcing a state tax statute relating to P.X.'s and government installations installed in the camps. It was brought by the United States against this enforcement officer.

Judge Parker and the three judges decided the case by deciding that the constitutionality problem could be brought. The question was never raised by the Supreme Court or otherwise that that was a proper way to test the constitutionality of the statute. The Supreme Court held that it should have been before the three-judge court, and they reversed on that ground and kept the decree in effect.

[fol. 373] Now, there is another rather recent case to which there is a footnote attached, the Alabama case cited in the defendant's brief, in which there is a footnote, as I recall, saying that this is not a—it may be in the Quitzell (?) case. But without dwelling on that—if you would like for me, I will elaborate on it. I would say that since Ex Parte Young this is a proper way to test the constitutionality of the statute.

Judge Carter: Even without alleging that the State Commission has taken any action in order to carry out the statute, or attempted to?

Mr. McConnell: Well, the statute itself, if Your Honor please, the statute itself, if you observe it, is self-executing.

It says there will no longer be these reduced rates without Commission approval. And our injunction and the temporary restraining order which was requested from Your Honor, the Commission of course had power to prosecute people without violating this statute. And they have other powers as well, process and otherwise. But principally under the California statute they institute the prosecution.

We ask the injunction of that action on their part until such time as this thing could be determined whether or not it is constitutional or not constitutional. And that is the controversy, basically, whether it is or is not constitutional. And we think, if Your Honor please, it was quite proper [fol. 374] for you-all, within your equitable power for you to take some affirmative action here to alleviate the confusion that would have resulted had they not been warned that the Commission—that this statute was not going to go into effect.

The controversy, then, is, is this statute constitutional or is it not? It is a plain question of that sort which has frequently been before the courts, and on which you will see the United States has brought similar actions. This Query against United States is a typical one.

Now, with respect to whether or not it is proper for equity, I think that the defendants have admitted that without this restraining order immediately this statute goes into effect. Going into effect, it abolishes long standing practice, and admittedly the rate structure would be higher.

The loss of money—before I came out here I had a young friend whose wife had taken an option on a house, then decided she couldn't live in it and had to get rid of it and get another house and lost some money, and he told me; he says, "One thing the church should get is a liniment for people who lost money." He says, "They would get more men in church then than they would women."

But the loss of money is something that couldn't be repaid.

Judge Parker said in the case of Wallace against Currin, fol. 375, which is also cited in our brief, "If the statute is in fact unconstitutional, no one remotely affected should be subjected to it, if it is in fact unconstitutional."

Now, the United States is not just remotely affected here. The moment this restraining order goes out of effect, under penalties, subject to prosecution and everything, the rates will immediately go up.

Not only will the rates immediately go up, but many other confusing things will take place. It will take a lot of additional administrative work. And although my friend seems to think that this element of secrecy is something we put in here as a sort of a chimera of some sort, we get that information from the military which asked us to bring this action. There would be the dangers of that.

Now, this precise question as to whether or not this type of case would present a controversy under the Declaratory Judgment Act, we think the equity thing, without the Declaratory Judgment Act, would probably the equity power would probably be sufficient, and was sufficient before the Declaratory Judgment Act, as Judge Parker pointed out. It came up down in Texas where an action was brought to enjoin the railroad commissioner of Texas from assuming jurisdiction over rates on government property and the judge there, Judge Jack Roberts, who is a State District Judge, had no difficulty in his judgment reciting the fact that there was an action, an actual contro- [fol. 376] versy.

I think a reflection in that regard will show that actually this is a standard, almost a classical case for declaratory judgment; that the framing of an action against the Commission is the standard way to proceed to test the constitutionality of the act since Ex Parte Young. And to my thinking, this thing hangs like a Damoclesian sword under a statute which we allege to be unconstitutional. And as Judge Roberts stated in his judgment —

Judge Carter: The last page.

Mr. McConnell: Well, this is in the judgment. That's just a press release he put out.

Judge Carter: I see.

Mr. McConnell: On page 15.

"And that there is an actual, bona-fide controversy existing between the plaintiff, the plaintiff intervener, on the one hand and the defendant intervener on the

> relief; and that the plaintiff's intervener should have declaratory relief to terminate the uncertainty and controversy giving rise to this suit. The basic controversy here is, is not this statute unconstitutional."

That was decided under the Uniform Declaratory Judgment Act.

And as I stated, in Wallace against Currin, 95 Fed. 2nd 856, that case is there cited—that's an action brought to [fol. 377] test the constitutionality of a federal statute under the old Agricultural ———— Act that regulated tobacco markets. The tobacco warehousemen—it was a peculiar kind of the tobacco marketing was peculiar, permitting people from South Carolina—not just the warehousemen, but he operates a different function. He brought this action to test the constitutionality of this tobacco market.

It was brought against Wallace, not against the United States. Wallace was then Secretary of Agriculture. Judge Parker stated that it was both a case for equitable and declaratory relief. He made this general statement, that no one should be subjected to the operation of a statute if in fact, under appropriate constitutional principles, it was unconstitutional.

And the authority of those cases, the ones we relied on, Wallace against Currin, the practice that is implicit in United States against Query, cited on page 17 of our brief, Ex Parte Young, the old Hunt against the United States case in which you can see in the arguments of counsel there the position taken that the thing was in fact a suit against the State and this was an improper way to bring it——

Judge Lemmon: If the statute is self-executing, how could any remedy be efficacious against the Public Utilities Commission?

Mr. McConnell: Well, maybe we use "self-executing" in [fol. 378] a rather broad sense. By that we meant that once the statute went into effect the Public Utilities Commission had nothing to do under its duties and responsibilities under the act but to prosecute anybody for not complying with the act.

I take it that if you withdrew this restraining order now and a common carrier arranged to carry property from Oakland to Camp Pendleton at some rate that had been negotiated, and he went on and did that, they could bring him up and prosecute him for violating the Public Utility law, because when this statute goes into effect it is his legal duty to carry that only at his published rate. They could put him in jail for six months.

Judge Lemmon: Has this court the power to enjoin federal prosecution under a criminal statute?

Mr. McConnell: Well, of course, Your Honor please, it gets into that field of equity where you have your equities reluctant to enjoin criminal prosecutions. That's one separate thing. But where officers are going out on a statute which is in fact invalid, then the court has the power and the duty, if we may submit, of determining whether or not that statute is in fact valid or not valid.

Judge Lemmon: Of course that question could be raised under legal remedies.

Mr. McConnell: It could be raised by a motion to quash the criminal proceeding, whether it be information or other- [fol. 379] wise. And there you would come right back to the raising of this issue.

Now, you say, "Well, in that way you could have raised the issue in the State Court."

Now, in the other cases that involve this same subject matter, if Your Honor pleases, which we have brought—the one in Texas which is mentioned in our brief, the one in Pennsylvania which is mentioned in our brief, and the one in Louisiana which is mentioned in our brief—we proceeded in the state courts.

I think it would be appropriate to state at this time, as is stated in our brief, and as has always been clear from a reasoning of the cases, that it is with great reluctance that the United States comes into federal court and questions one of the statutes. But in all of those cases, however, the statute itself was general in its terms and there was a very definite issue of interpretation as to whether or not it actually applied to shipments by the Government.

In Louisiana and Texas they decided it did not. But it is firmly established that where there is no question for

interpretation and a constitutional issue is raised, that a three-judge federal court is the appropriate forum.

Those cases are the latest ones. There is Toomer versus Witsell, cited on page 16 of our brief. That case involved a statute of South Carolina that purported to regulate the [fol. 380] shrimp industry, shrimp fishing down along the coast there.

Judge Parker again, sitting down in the lower court there, says that this is not the type of case that you have to send back to the State. There is no ambiguity on the face of the thing. The thing there explains what it does.

Here they admit that here this statute, under this statute and under this amendment, unequivocally, no one can dispute it, they from the podium say it, that when it goes into effect rates for shipment of government property are subject to the plenary jurisdiction of the Commission. They cannot grant any rates other than the published rates without the Commission's approval.

We state that under constitutional principles that exercise of the State, with all deference to it, is unconstitutional.

We further believe that all authorities will establish, and common sense and reason tell you, that this court which is especially set up for the purpose of determining the constitutionality of state statutes, is the primary forum in which this thing should and could be tested. We think that's the intent of Congress.

We might make one comment in passing here with respect to the equities that were referred to in the Alabama case. There is this idea of equities, the reluctance of federal courts to enter this.

[fol. 381] Of course, as Judge Carter pointed out, no one can estop the Government, the Federal Government or any government, by its participation or act. But this is not a question of anyone moving outside the realm or scope of his authority, to bring Mr. Mayo's name here. The Government has tried every way possible. This has become a general thing. The Government moves slowly, moves empirically, it adds pragmatic sanctions to the things it does, it weighs them and sifts them, and there is conflicting opinion, and you see this thing coming up from various

quarters, and you analyze it, and over a period of three or four months your position solidifies.

An effort was being made to work out something here until finally, with deep reflection on the constitutional principles involved by the Defense Department and the Public Service Administration and the other agencies involved with this problem, the policy was fixed and firm, and a letter was written under the signature of the various Defense Departments to the Attorney General requesting that vigorous action be taken, not just in California, but to test the constitutional validity by this exercise by the states of this peculiar power to regulate the rates for government property.

I think the history that was traced here this morning could only be used to show the great reluctance by the government to jump in pellmell without thought in a situation of this sort. It expressed confidence in the Commis- [fol. 382] sion, expressed confidence in the policies of the Legislature.

In other words, that might, of course, bring up another thing that has been brought up, and I do not want to digress on it.

There is always a tendency in recent years, here in the last two or three years, to raise the Stars and Bars at any time that there is some conflict between the State and the Federal Government. Now, this is not a case, if you will reflect on it, as dearly as love the Stars and Bars, it isn't a case for Stars and Bars. This is not a case in which the Federal Government comes down and tries to regulate the activities of anybody. No carrier in this state is bound in any way to deal with the Government except at its published rates.

I guess the principle of the Stars and Bars was originally evolved from Thomas Jefferson and Andrew Jackson, who believed in local autonomy, and the main principle from which it flowed was that the least governed people was the best governed people.

But here it is a state that is stepping down and putting something that wasn't under regulation under regulation. We always pinned our faith on competition. I take it that when we broke away from the colonial system we pinned

our faith on the fact that the plain factor of competition would bring about fairness in the long run.

[fol. 383] Now, the Government's position here is that, under that age old principle, as far as dealing with anybody that wants to deal with the Government, let those old factors that we have faith in operate. The Federal Government is not telling anybody to do anything whatsoever. I think they have used that shibboleth so many times, where reflection will show the principles involved are just to the contrary.

Now, if Your Honors please, I think with respect to the question of whether or not there is an actual controversy in a case for equitable relief, or whether or not this is properly brought in order to join the Commission, I think that a look at those cases, particularly the ones starting with Ex Parte Young, you will see from there—we didn't even dwell on that because it seems to be not even presented in these later cases like the Query case, Query against the United States. It was presented in the case of Hunt against the United States, in the arguments, you will see. The court didn't even consider it in its opinion.

Now, getting to the merits, if the Court please, on the—first of all, on the plaintiff's motion for an interlocutory injunction—and we won't burden the court with any more talk about whether there is an irreparable injury impending here because the facts are before you; nor will we get into an elemental discussion about the balance of conveniences. Just purely the merits from the standpoint of the [fol. 384] preliminary injunction.

Judge Carter: Well, are you going to pass the constitutional question now as to whether or not the statute is, in effect, unconstitutional?

Mr. McConnell: That is right. That is what I consider the merits. That is what I consider the controversy here.

Judge Carter: Then you are going to pass that for the moment?

Mr. McConnell: No, sir, I am going right into that.

Judge Carter: Oh, I thought you were going into the question of whether or not we should issue an injunction, not because the statute is unconstitutional but because we

had to preserve the status quo until we did determine the constitutionality.

Mr. McConnell: Well, I was doing that on the balance of the conveniences. If we don't have any strong merits, then we don't have any grounds for interlocutory injunction.

Judge Carter: Yes.

Mr. McConnell: And I also addressed it to the motion to dismiss for failure to state a relief on claims which we grant.

I might observe on that particular aspect of it, as you will see the defendant raises some question with respect to the style of pleading that we used.

It is always important to bear in mind, if the Court [fol. 385] pleases, the fact that a constitutional case is different from a case of accident, an action in trespass, or any of those cases in which you are dealing with past facts and trying to apply remedial justice to past facts. In constitutional cases the one essential fact is the statute, and then you have the fact that it comes out with mathematical certainty when you have people familiar with any operation it has to be projected to some degree in the future.

Now, the precise question was raised on a motion to dismiss in the case of Gibbs versus Buck, 307 U.S., cited on page 6 of our brief, in which some citizens of Florida were testing some musical—some composers were testing the constitutionality of the state statute there trying to regulate—trying actually to break up a sort of monopoly of the unions there.

The thing went to the Supreme Court on the motion to dismiss, and the Supreme Court recognized the fact that in a constitutional case the motion to dismiss and the admissions, and so forth, must be tested by different standards and the pleading of a constitutional issue must be in a different—cast in a different mold. In a sense it involves a state and the United States. It must be, in effect, a state document. And the court in that Buck case simply held that if, from a reflection of the contest as it appears, this allegation that the statute is invalid, that there is a serious [fol. 386] constitutional question raised, then the motion to dismiss should be denied and it should go to final hearing and explore all the facts and make the final judgment there.

There are three or four things at the outset I think should be borne in mind when you go into the question of whether or not this statute is or is not constitutional.

Always bear in mind unequivocally that it says that from here on in California shipments by the United States would be subject completely to the control of the Commission. That is the effect of it.

Now, let's look at the history of this thing:

This, if the Court pleases, as you go into it and reflect on it, is a question of first impression. When the law of public utilities, growing out of the innkeepers and stage coachmen back in England, was being developed in the time of Lord ————, and those other great judges that were recognizing the fact that due to the monopoly position, the condition of highwaymen, and so forth, the common carriers had this obligation to carry for all, and you couldn't turn them out, and later developed the idea of equality of treatment, non-discrimination, and things of that sort, it is aways recognized as you get into it, that the property and the care of business for the king were different, particularly when you came into situations where commerce and trade were developed. The property of the king, there was no [fol. 387] necessity for having uniformity with respect to the property of the king.

Now, ever since we started here in 1709, established an army, common carriers have been carrying property for the United States according to special arrangements. The old common law conception of non-discrimination to avoid prejudice and preferential advantages was recognized as never applying to property for the military for the simple reason that it doesn't compete with anybody. Other reasons as well: it's peculiarity, it goes in channels different from commercial trade; it's for the purposes of defense; it is initiated different.

Accordingly, when the granges and the agitation came after the Civil War to have regulation of common carriers, in no instance that I know of, and I think we are correct in it, no instance in those statutes that preceded the Interstate Commerce Act, was there any effort made to regulate the rates of shipments of property for the United States.

Now, when the Interstate Commerce Act was enacted in 1887, it was prescribed to require that all shipments be made on published tariffs, uniform, without any discrimination with respect to persons or locality. Again, you have Section 22 of the act, which expressly said that this scheme, this statutory scheme, will not apply to shipments of property for the United States.

[fol. 388] From 1887 until 1950, of course, the Interstate Commerce Act has never changed and hasn't changed to this date so far as interstate shipments. It doesn't apply to government property. No state ever questioned or ever asserted jurisdiction over the shipments of government property.

Now, for some reason, around 1950 cropping up over the land were various efforts made to subject it to state statute. The first came up down in Louisiana where they had a lot of gas and oil being shipped around down there, had some aviation installations down there, big oil center. They asserted jurisdiction. An action was brought in the state court down there saying, "Your statute doesn't apply to this shipment."

It ended up in the Supreme Court of Louisiana and they said, "No, it doesn't." The lower court in Louisiana said that if it did it would be unconstitutional.

Then the thing cropped up again in Pennsylvania. There again it involved shipments of airplane parts. The Government appeared in that proceeding through the Judge Advocate General's office and said, "If you construe your statute this way it will be unconstitutional."

The Commission brushed that out the window, an appeal was taken to the Supreme Court of Pennsylvania in the orderly procedure there, and as a fact it is still in litigation and they never have changed the form of practice. It [fol. 389] is an entente that has been reached with the Commission itself, and now until that thing is determined it will be carried as it always was.

The matter was precipitated down in Texas in November. The United States intervened in an action brought by the railroad, and there the judge decided that the statute didn't apply, and in so deciding implied that if it did it would

be unconstitutional, and put an injunction, and that case is now pending in the Court of Civil Appeals in Texas.

In a backhanded way the question came up in Kentucky, in a way that I will have to explain later. Some man got in a squabble with the general accounting office, which is not at all unusual, about how much he should be paid, and they thought they were talking about what the accounting procedures were and what their rights were under the various tariff rates, and lo and behold, this man jumped in with the constitutional thing, and you have a situation there in which you have this case which has been completely reopened under the views of the Department, at any rate. And what the local situation is in Kentucky, we are not very familiar with how they are carrying their property there, but there is some confusion.

There are intimations that in Georgia and in Michigan the Commissions are getting ready to move.

We might say that the thing is not all on that side of [fol. 390] the horn. Nebraska started to take action and they got an opinion of their Attorney General in which he said that the State statute didn't apply that it did apply to government shipments. Representatives of the Judge Advocate General's office appeared there and argued before the Commission, and the Commission itself recommended to the Legislature, which the Legislature enacted, which expressly exempted and so removed the doubt.

Prior to that time the thing had been raised at another period in history in Illinois and Arizona and the Commissions there themselves refused to assert jurisdiction.

I recite all that for this reason: for 160 years, and longer than that, back to the tradition of England, carriers have been permitted to carry property for the United States at rates which were negotiated and were not subject to Commission regulation of any sort.

So that if this restraining order, this very little piece of paper, is taken out of effect at this time, for the first time in the history of England and America the shipments of government property will be subjected to Commission regulation with respect to rates. So this case is a—it stands out on the threshold.

Now, in addition to that there is one other general observation, may it please the Court. This is not just a local case. As we have tried to say, the United States regards [fol. 391] with great deference the Commission and the institutions of California.

This case is one of nationwide application. The power here either exists or it does not exist. We are dealing in terms of constitutional power. If the power exists to do this, and it is a rather simple question, then every other state can enact similar statutes. And from just an empirical observation of what has happened up to this date, and we can't fail to be political realists of the democratic process, we can assume that in many if not all the other states this regulation of these rates will take place by local commissions. It is not a local problem at all. I don't think that you could think of it in terms of little flurries of competition in little situations that are whirlpooling around all over everywhere at all times, and which we have faith will be taken care of by competition in the end. We cannot think about it in those terms. We have to think about it nationwide. 48 separate geographic components.

I think it is important to keep that in mind, because it is very easy with these tight situations, and motions, and so forth, to use Charles Lamb's phrase, "Burn down the barn to roast the pig."

Now, there is another general observation, if the Court pleases. It is not only nationwide, but it is for all time. [fol. 392] This principle, when we are discussing this thing, you have to go back to the mind of John Marshall in McCulloch against Maryland. That's a case that involves taxes and things of that sort.

There are a few of those big landmark cases in the philosophy of the federal system. Once this principle is engrained it is to be projected through the ages. It will apply as well in times of complete peace and times in the heat of war.

I hope we did not sound hysterical in our brief in reciting the fact that this particular time is not a time of complete peace and that that sort of affects the situation in some degree as it operates as of this time. But I think we will have to remember that we are at a crossroads here

where our history has been for 200 years in one direction, or on one principle, and the principle here decided will operate for time immemorial, we hope.

Now, may it please the Court, with those basic factors borne in mind, I would like to get down concretely as to why we think that a statute regulating, a state statute giving the state commission power to regulate the rates

(Discussion among members of the Court off the record.)

Judge Lemmon: You may finish your argument and then we will take a recess, and the Public Utilities Commission [fol. 393] will complete the argument after the recess.

Judge Carter: In other words, Mr. McConnell, you can finish your argument here and now?

Mr. McConnell: All right. I think I calculated on ten or twelve minutes, something of that sort. I am a little bit pressed. I want to be as brief as I possibly can.

I think that as a basic thing, in thinking about this problem, just why the Government does strenuously object to this assertion of jurisdiction and thinks the statute unconstitutional necessitates in some degree an understanding of the nature of the Government's supply function.

I don't know whether you can see this map or not?

Judge Carter: We can all see it.

Mr. McConnell: Now, the United States throughout the years, and particularly after the first World War and after World War II, when its military problems were even vaster than what they are today, one of its main problems has been the logistical problem or the problem of supply. Now, throughout the years there has been worked on what has been known as the "depot" system, which is designed, after a lot of thought by the best brains that the United States has for meeting strategic and tactical needs at any particular time, has been designed and established not only in the United States but at all points in the world at the present time, since we have commitments on almost all continents.

[fol. 394] The thing is designed to care for whatever our strategical plan may be, and that must shift from times to

time as things go on. But the general purpose is to make an effective force where that force has to be committed.

Now, it happens from the nature of things that a great, complex military supply system of that sort would have little relationship to the geographic boundaries of the states.

Now, this is a map that has on it, and it is an unrestricted map that we may use and put in evidence, that has all the military installations of the United States with legends here, little dots.

These lines here represent corps—they used to be called corps areas. They are units for administration, both for command purposes and for supply purposes, but certainly it is very important for supply purposes.

Now, you can see that these units do not in any way conform to state lines. For example, the fourth unit here, the fourth army unit——

Judge Carter: The sixth army?

Mr. McConnell: Oh, excuse me, the sixth. That comprises Wyoming, Washington, Oregon, California, Nevada, Utah, and so on. These numbers here are the navy's. The Navy District comprises several states as well.

Now, those command units and supply units are highly [fol. 395] integrated. For example, the depots situated in there are all interrelated so material goes back and forth between them.

An example of it is, say, Sharpe's General Depot here in California. That is backed up by a depot over in Utah, in Salt Lake City, the general purpose being to have these supplies disposed where they can get the maximum utility out of them in the event of any contingency. They have little or no relation to the state boundaries. In this supply system there is always churning this current material to meet our military needs.

Now, one feature about the location of the depots—I don't want to bore the Court—is that they are located as a rule outside of large commercial areas. The land is cheaper, and so forth. And frequently these movements from depot to depot move contrary to the way a commercial shipment would move. I mean, a movement might take

place, say, from Pendleton to some place out in the desert.

The only thing I point out is that here you have a well thought out and unified plan on a national scale, has its subdivisions in terrain departments—or compartments that are identical for one reason or another, and in there your have a unified system. So that when you think about injecting local regulations in 48 states which cut into all those terrain departments, you have to think very carefully [fol. 396] because this is a very important part of our national machinery, this depot system, as it is located.

Now, we will go into just how that will be affected by asserting down in these focal geographic areas in this intricate machine, how that will actually affect this almost essential federal activity.

Now, thinking about that point, it's easy, in the first place, to think of the nature of a state regulatory process. Now, California has several peculiarities in it in connection with the classification of carriers, and so forth and so on. But the statute in itself, it's overall philosophy and contour is a garden variety type.

First of all, it has a regulation which says that all common carriers shall publish tariffs, and that they are prohibited from carrying for anybody except at the published tariffs. Here it is complicated by this "hireing" thing which has a minimum rate, which is a prescribed tariff, you see, a sort of a mixture of the two, the minimum rate for the hiring of carriers, which, as I understand it, like they have in Texas, down there the Commission prescribes the rates.

Now, this is another feature that it has in it. Any common carrier can publish its rates. It says all carriers at all times—and this is very important, to get the underlying thing that gives our feeling in this regard—any common carrier at any time must have published and on file with [fol. 397] the Commission, a rate from one point, any conceivable point, may it please the Court, to any other conceivable point to carry any conceivable commodity, known as the class rates or the paper rates in the trade.

For example, there will have to be in existence down there in the Commission now, they would say—here you've got a Sierra Depot up here—there would have to be a rate in

existence and published down there now to carry bananas from there to San Diego. On the other hand, there would have to be a rate from San Diego to Lake Tahoe to carry cranberries up there. There will have to be a rate from 29 Palms to carry elephants to San Francisco. And so forth. There has to be in existence at all times a rate to carry something from every conceivable point every conceivable thing to every conceivable point.

Now, of course that class rate, the way it's worked out, they have residual clauses in it and you have to classify it and make it into something similar. It's humanly impossible. It is absolutely impossible.

Now, we are not saying this class rate is an unrealistic thing. It was gotten up by the best brains in the transportation industry. As a usual rule it is designed for retail shipments, like if you were going to ship a box of shoes from a store here down to San Diego, you would have something there for an existing rate. Or if you were going to [fol. 398] ship a crate of oranges or something of that sort, retail merchandise, a mail order house or something of that sort, they get in on that class rate.

As a usual rule, you will see—well, there is another aspect before going into that point.

Of course, the fact that they have all those published rates, those paper rates, as we call them, in existence, does not prohibit the carrier from getting on the statute published rates, and they can and do all the time, for commercial shippers.

It is inconceivable that, say, Ford would put up a plant here in San Francisco, an assembly plant, that would take a lot of his material from Detroit and ship down to San Diego. With well engrained channels of trade like that, it is inconceivable that they would just stay up under this class rate or paper rate that is designed to meet the statutory requirement for small shippers, and so forth.

The traffic manager of the Ford factory here would get together with the vice-president of the railroad, and before establishing his factory they would work out some equitable rate basis for the carrying of this property through its well engrained chain into the plant and out of the plant, and so forth.

That rate, in the nature of things, is density and volume, which are well known to the experts in the field, would be [fol. 399] considerably lower than a class rate. And it should be. The carrier earns a reasonable return, service is put on a basis where you have liaison, and the whole thing works out very well.

That is known as a commodity or going rate in commercial circles.

As soon as these two people work out a rate of that sort they can go down and publish it before the Commission. It then becomes a commodity or going rate between that area for those commodities. It can be used by any other shipper. It is usually negotiated by some particular industry or some enterprise of that sort. But it is always there, open.

Now, here's another thing that is a feature of every state regulatory agency, and it is a feature of California as well.

If in one of these commodity rates which has been published, if anybody objects to it, or if the Commission itself feels that for some reason it is not fair, or it prejudices somebody to some degree, they can hold an investigation, or if somebody protests it is necessary to hold a public hearing, and you air the whole thing out, and you have notices of hearing, everybody appears, and then you postpone it and it goes on and the whole thing is aired out over a period of time. There is probably some interim relief.

It is aired out in public. It is long drawn out. It's tech- [fol. 400] nical. It's just a great big administrative public hearing.

Now, those are the regulations that you are going to impose in the separate state places on these depot systems.

I think it would be well worthwhile to point out just the way the Government has been working for the last 150 years and why it does.

The government shipments, as we said in the first place, they are commodities that come up, there are many varieties that are not similar to the varieties in commercial trade.

Secondly, the movements originate on very short notice.

Thirdly, they are going to places outside of commercial channels.

So under the established practice, the Government has worked out through the practices of the years a certain

system which is designed for its peculiar needs. And to just explain what that system is:

The Government in California or elsewhere first of all will use a lot of published rates. That it does, and it does that. A lot of its shipments are made by the regular published rates—both class rates and commodity rates. They might find,—say, some well established commodity rates between, say, San Francisco and San Diego, and so they use a lot of those.

Then the Government has peculiar channels of trade that [fol. 401] are somewhat like commercial channels of trade. For example, from Oakland to San Diego, the traffic down there will be so regular, the commodities, the density and everything, will be different from commercial rates, so they will get together with the various carriers and work out what is in effect a commodity or going rate between Oakland and San Diego that has nothing to do with commercial, but it is just worked out because they have a well channelled traffic between those points.

Then so often, more often than not, these government things will originate on sudden notice and with no rate, no commodity rate either by it or by the commercial shipper in existence. Now, any one of these traffic men can just reach in his file and pull out illustration after illustration. I am using this for illustrative purposes on a movement of that sort.

Here since this restraining order went into effect there was a training exercise of an armored combat unit from the Marine Base at Pendleton out at 29 Palms. There was no commercial going rate out there, of course. The Government had not had one of these. It was a sort of irregular movement that came up almost on a moment's notice. They didn't have one of these rates figured out, a well engrained channel thing, which is, of course, lower than this retail paper rate, and that movement had to start. The command [fol. 402] decided they were going to have this training exercise out in this area.

Well, the process they followed, the Quartermaster at Pendleton, they started the movement. And that is what the Government does, because the Government must move. We must always remember that. They are trained to get

there on time. I mean the military. The other parts of the Government, I have got my doubts about that.

But anyway they started the movement down there. The Quartermaster down there called up the traffic control officer in San Francisco and gave him the information. The traffic control officer in San Francisco called up Washington and gave him the information. And they have a representative of the railroad in Washington, and they worked out a rate for the movement of some eight million pounds of traffic, which of course would entitle them to a commodity or going rate to accomplish this movement between Pendleton and 29 Palms.

Now, how did they arrive at that rate? How did they arrive at that rate from Pendleton to 29 Palms? They didn't just pull it out of the air.

The traffic experts from the Government—this happened to be the Santa Fe there—sat down and took comparable commercial rates, comparable commercial rates for the density and volume and everything of that sort. The cost of that entire shipment, then, under this flexible process [fol. 403] was something like $19,000. If they had had to ship that by this class rate, which is not designed for such a shipment at all, it would have been something like—it was a saving of $19,000 for this particular shipment. And the rate which they finally arrived at was done by the comparison of commercial rates. And all this we will establish.

Now, the other features about the government shipments, government machinery, in spite of what our friend says—I didn't know; I just added a footnote in there saying that General Jackson, who did surprise a lot of people, and I don't think you will question his ability, he did surprise a lot, he says, "If my coat knew my plans I would burn it up."

So there is something to military secrecy, and in spite of the fact that we are in this stage now, there are certain things that I hope somebody is keeping secret.

It doesn't take anybody living in California—and you can't go into it; I mean, you can't get any evidence or anything else—no one living in California knowing that Cal Tech is one place and the University of California is over here with all its laboratories and researches in another place, and knowing all this desert space out here and

everything else, that wouldn't realize for a moment that there must be some shipments going on around here that we don't want to be having a public hearing about before this Public Utilities Commission and everybody else in [fol. 404] order to establish what would be a rate that would be comparable to a similar rate on shipment of that property.

Accordingly, say, for example, just picking something out of the air, if you had a shipment from San Diego of, say, some very secret equipment to be tested at 29 Palms, and that equipment, let us say, the whole thing would weigh millions of pounds, and you don't have any worked-out rate there, what they would do, security cleared people would communicate under code with other security cleared people, it would go back to Washington to some other security cleared people, and they would make this movement under armed guard without anybody knowing whatsoever what the commodity was.

Now, how would this statute affect this flexible and, it seems to us, necessary and fair procedure of rate adjustment?

In the first place, from the nature of things—take the illustration of this shipment from Pendleton when they had this armored unit out there, eight million pounds. Suppose this restraining order had not been in effect. If they had made that shipment under the California statute, it would have had to have been made at the published rates between those two points. And those, under the circumstances, would have been the class rates which are designed for retail trade although the movement involved eight million pounds, and it would have cost something like $37,000. If they had to make the movement, that is what they would have had to do.

[fol. 405] If they would say, "Well, we will put off our exercise"—and that is always bad. You are going to get hamstrung sooner or later if you always have to be putting it off.

We will say, "We ought to get a fairer rate prescribed, we will go up to the Commission and get their approval of this." Well, that's going to take time.

They go up there, and anybody wants to suggest one can suggest one. First thing, you know about the movement, for one thing. You get in a long hassle and you never get moved.

Now, that's one effect that this statute would have. Suppose the thing would have been secret, you would have another problem. You just have to move at class rates.

Now, there is another aspect of the matter where the statute would have an effect. If they do classify all this stuff under the class rates, well, that's going to take—it takes a man about five hours under one boxcar, a trained expert clerk, to do the paper work to classify the stuff. And there you have lost man hours on the part of the Government.

So the impact of this statute even in California, much less in all the other 48 states, would completely disrupt this whole mechanism, subjecting the United States to an inestimable higher rate, endanger the elements of security in many instances, cause loss of man hours which could be [fol. 406] utilized much better elsewhere. All this at a time when everybody knows that one of the essential problems this country has got is to have economy of force and manpower. I don't think anybody would deny it that President Eisenhower over and over again comes out with it, and the great hope is to curtail this kind of thing.

Now, that's just a rough sketch of the impact. We will hope to develop that later.

The other side of the horn here is, what good from the standpoint of the citizens of California as a whole, or the citizens of any other state, will this particular type of regulation—what good will it do them?

Obviously—it was brought up here this morning—you do have these knots-up and flurries of competitive situations. I do not know what the local situation was here. You had it down in Texas, you had it in some places, household goods one place, something else another. Local situations.

We pinned our faith on competition in designing those things in the first place.

But aside from putting this Procrustean mold over this flexible situation to correct a local flurry, which we say

smacks of burning down the house to roast the pig, aside from that, look at what other good can come from it.

First of all these statutes with respect to uniformity were designed primarily to protect persons and localities [fol. 407] from prejudice. That's the history of them. It was only till they had the Interstate Commerce Act and they had a new policy of maintaining competition, and so forth, that the other element became very prominent.

The commodities of the United States do not compete with anybody. Accordingly, there is no reason—that basic reason doesn't exist. Cannons, and so forth, do not compete.

Secondly, it must be borne in mind that the United States is assiduously careful to see to it that it employs only carriers who are actually qualified with respect to safety and otherwise, insurance, for the Government. So there is nothing here that affects the safety.

Judge Carter: You admit police power regulation is not a violation of the Federal Constitution insofar as providing for an army and navy?

Mr. McConnell: The police regulations? No.

Judge Carter: And as to safety, and so on?

Mr. McConnell: Safety and all those elements, I will say the Government not only tries to do everything they can to cooperate with all those things—anything designed to take care of the highway and those elements.

Judge Carter: Revenues? Legitimate revenue measures? Taxes?

Mr. McConnell: Taxes and those things that are levied on there, the only time the Government comes in on taxes is [fol. 408] in relation to ones of its instrumentalities of some sort. But all the rest of that, the Government says that is a matter for the State and cooperates with the State in every way possible in that respect.

Judge Carter: Well, and the cases hold that——

Mr. McConnell: (Interposing) And the cases hold that that is as it should be in the police power. ——————— against South Carolina, and those cases of long standing.

Now, here are other aspects that the thing would have. As I say, there is one criterion that has been issued to all the Armed Forces. Economy is the watchword. That is not

on account of any—I mean, it isn't any fact that you've got the pump primed thing, it's just the fact that we have commitments for fifty million dollars, and the tax structure is always strong in free enterprise, and we are paying all this money under this pressure, the instruments of war, and so forth, that have no utility other than destruction, and they are changing all the time, so they have just got to keep that down.

Now, if an officer, say, here at the Sierra Depot, which is up here (indicating on map) and it's a big element—a big ordnance installation, was going to ship ammunition, that is a big ammunition shipment. If he is going to ship ammunition, he should have a route open in California, and one open that went to Nevada, he would compare rates. If [fol. 409] this rate structure would be high here, he would employ the carrier with the interstate route. That is simple.

Also, it doesn't apply so much in California as it does other places, the procurement policies that would cross state lines. That would, we think, prejudice in the long run the carriers of the states.

Now, that's not certain because down here in Texas where we had the Red River Arsenal, over here in northeast Texas, and this thing started moving in, they started moving all the traffic there back up this way across to the Oklahoma line. Similar-y, they had the oil thing coming down here, and they started to come in——

Judge Carter: You mean Louisiana?

Mr. McConnell: Well, it was in Texas. They moved it around through Louisiana and back in here.

Now, the contracting officer of the Government is obligated and it is his duty, if they have a cheaper way of getting it there and getting it there on time, they will do it, and in the end it is a fact that some of the carriers here may be prejudiced.

There is another aspect of the matter, and I think we will have testimony to that effect, that if this thing becomes general all over the 48 states and the transportation bill of the United States is increased, say, fifty or a hundred million dollars, just the rate increase aside from all [fol. 410] the administrative difficulty and the other attendant obstructions that result from this thing in 48 different

geographic areas, they will undoubtedly have to revamp and redesign this whole system. Now, that would be unfortunate for a competitive flurry of some sort which, though regrettable, is something that always happens in every other sort of industry and is always eventually taken care of by competition. This thing, we take it, having been developed in 50 years of study, or since the first World War, this depot system, was designed for the purposes of most economically performing the logistical function. Now, if you have to start changing and curtailing and doing that just because of this State regulation, which has no relation whatsoever to the logistical or strategic needs of the country, it will be extremely unfortunate.

And in connection with it, if the rates in California become unreasonably high, there is no doubt about the fact that the installations here will become curtailed.

I was reading a paper yesterday. I didn't know much about it; knew nothing about it, in fact—I passed through it up here. Is it Marysvale? Maryville. There is an installation up there that illustrates a lot of things here. I saw in the paper they are going to have some secret tests there. It came out in the paper that they were thinking about changing that thing, and it seems that the installation [fol. 411] there was of importance to the community. I think that has to be borne in mind when you think about what good this thing does for the community as a whole.

Here in recent years—I don't know where it is coming from—there are certain segments of the body politic made a contention that the Government is going around getting cheap rates and thereby upping commercial rates. That thesis has been toyed around with. Several years ago—last year, I guess, after hearing that thing for so long, the Interstate Commerce Commission has got a Bureau of Statistics there, and they got their Bureau of Statistics to work on and find out the truth of that thesis. They made two studies which are published, and those studies showed that under the present system the Government rates are approximately 13 to 14 per cent higher than the commercial rates on comparable shipments. They have their own statisticians.

The Defense Department, incidentally, made its own study and came out with the same result. And just before I left the General Service Administration advised me they made a study and came out with more or less the same result.

Judge Carter: As I understand you, Mr. McConnell, it doesn't make any difference whether it is higher or lower. It is an interference with the power of the Federal Government.

Mr. McConnell: The power of the Federal Government. I thought that might be appropriate since that charge is [fol. 412] made. I think it is probably improper to make it because it raises a collateral issue. We could get our statisticians here to show it.

I merely point out that the Government is required to pay a reasonable rate. It is on instructions to pay a reasonable rate. Nobody has to carry for it, and nobody has to go broke carrying for the Government. Now, of course, if the Government pays a higher rate maybe the carrier would be in a position to haul for somebody at a cheaper rate. In other words, let the Government—. Why not subsidize direct?.

Now, to get back to one other underlying thing here. I think it is always important to bear in mind that this thing is nationwide and not just local. Any increase in expense here will have to be ultimately borne by the taxpayers, including the taxpayers of California. Ultimately the people that would get the direct benefit will be the carriers, and the citizens as a whole of the whole country, and California as well; it would come ultimately out of their pockets. And the effect of it is not like taking money from Peter to pay Paul, either.

Now, I have a little more time and am just going to touch on the other things and rely on my brief.

We say here now there is a principle in government supplies of keeping down the inventory. Airplane engines cost so much and the models change so often that you don't want [fol. 413] to keep many of them on hand.

That applies to almost every weapon, to all this expensive electronic equipment. Accordingly, the velocity of movement in the depot system is stepped up terrifically.

Down in one of these air bases, for example, an airplane engine comes in and goes out almost daily. This thing is a seething current here. Nothing has any resting place.

You take, for example, these tanks that were taken from Pendleton up here to 29 Palms for this training exercise. Those tanks probably came from Detroit, Michigan. They came through an intermediate depot. The Army handled that function. Came down to Utah. From there they probably, we will say, came down to Sharpe, or they may have gone direct down to Pendleton where they became organization equipment of this unit, and had that any final resting place in California?

The Marine Unit there stands in readiness to go on a mission. Sooner or later they go off on an amphibious thing to Alaska, to the Aleutian Islands, or they plan to go out and seize some island or something of that sort in the event of an emergency.

So I think that under the modern concept of commerce, which is somewhat opaque, you can say that at any one of these depots this material is turning in there and going out and it is always in interstate commerce, and that a regulation of this type, and you could spin out a very logical [fol. 414] argument from the cases in that direction, would be a burden on commerce.

Our position primarily is that this would just be a thing that interferes with the function of supplying troops.

But we do point to the fact that there is this other consideration here, and it's a very serious one, and we developed it in our brief. These things move from enclaves under exclusive jurisdiction to enclaves under exclusive jurisdiction. Is that something under the exclusive jurisdiction of the Federal Government? Probably it is, under the case of the Supreme Court of California. Under the Supreme Court of the United States I can't make out precisely what it would be.

There is only one thing I can see is that that concept is interjected there, and it is a very real one, and the Court may very well permit study and knowledge of the thing and come to the conclusion that this regulation would be a very definite burden on interstate commerce, and that the whole thing is valid for that reason.

Now this would be certain, that in any particular case it would make for such a confused situation it would be almost impossible to administer an act of this sort.

You have a shipment, for example, coming from Oakland to Moffett Field, both areas being in the exclusive jurisdiction of the Government, Moffett by a decision of the Supreme Court of California in the exclusive jurisdiction [fol. 415] And it is one of those shipments, a multi-carload shipment, which is another peculiarity of government shipments. They put them in carload lots. If we had this statute they couldn't do that, couldn't put them in carload lots.

So it becomes very important to the traffic out there to have these things moved in carload lots, a carload lot arrangement instead of going through all the classifications and things that would be required if this statute were there.

He would say "I am in interstate commerce here." The Commission's attorneys and enforcement officers say, "No, you are not. That is intrastate commerce."

Friction. Friction for no good purpose.

Again, you would have a lot of material that moves, actually has no final resting place until consumed in some operation. Moving on training purposes, all intermingled with other material. A local shipment like that shipment back there from Pendleton to 29 Palms.

The traffic officer says, "Well, this thing is not subject to Commission jurisdiction." The Commission man: "Yes, it is." Friction for no good purpose. It would be almost impossible to administer this thing without friction. That is, unless if the Government officers conscientiously did their duty, and they are all legally advised, and I am sure they would.

Now, that concept is there. Throughout the brief we take [fol. 416] the position, in the first place, that this is in that area of the Constitution where the Constitution itself is self-executing.

Now, there are a lot of cases. I think the strongest cases are interstate commerce cases, and I think the most recent collation of cases is made by Judge Reed in United States against Malbin—I think that's 328 U.S.—in which he has completely catalogued all the cases, the cases in which the

State can regulate and in which they have absolute power to regulate.

U. S. against Bondell (?)—well, that's an example of that, safety of the highways, and so forth. Cases in which the State can regulate even though they are in the absence of a statute of Congress. And then states in which you have this twilight zone in which Congress can legislate.

And then over in another category you have those cases in which the Constitution itself is self executing, and in the absence of any act of Congress of anything else the State cannot step into that area. Now, in those things, as Mr. Justice Reed pointed out; it is always a question of balancing the drastic nature of the regulation and its effect on the federal function.

And here we see this thing so directly and unequivocally impinges and impedes the supply function that the constitutional provision for the supplying of the Armed Services [fol. 417] themselves are of such a nature that the thing will have to fall.

It is singular that as great a judge as Marshall was, back in Osborn against the bank, way back there, dealing with this same problem in connection with a bank, says:

> "Can a contractor for supplying a military post with provisions be refrained from making purchases within any state, or from transporting the provisions to the place——".

and he ends up by saying:

> "But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under state control."

Justice Holmes in Johnson against the United States quoted this language with approval again. That may very well be the law in the Prophets. We have other cases, more recent, that I will discuss later that might be in conflict, but that language becomes very appropriate right at this time.

But in spite of that fact, we say that Congress itself in this thing, even though the Constitution is so self-executing,

Congress itself has expressed the policy in this regard. Back in 1949, or culminating in 1949, before any state or any national any government anywhere in the Anglo Saxon world, I take it, had ever tried to do this, Congress enacted a statute in which it expressed the policy that all [fol. 418] rates for government shipments of government property would be by special negotiation, recognizing the unique character of the shipments and the unique requirements.

That statute was just general in its terms. It is plenary. It went out to all shippers. And obviously the reasons for having peculiar treatment of government service, government shipments, apply regardless of geographic terminology.

Now, when the statute expressly deciding the competition and negotiation for those rates, it was enacted in the setting of the policy expressed in exemptions of Section 22 of the Interstate Commerce Act, as expressed in a long history of the practices, as expressed at a time when there was no intimation that any states thought they had this particular power. It seems almost inevitable, by a process of *ex concessis*, to come to the conclusion that Congress definitely expressed the policy that rates for shipment of government property shall be by negotiation.

Now, passing just for a minute, much has been said and much will be said until this case is finally determined, and we suppose it will be determined finally and forever in the process here soon.

About the Penn Dairies case: that case involved, back in the first days of the war, drafting these National Guard divisions and putting them into these reservations for train- [fol. 419] ing. The Pennsylvania Statutes has the usual milk statute which says that no one can sell milk at less than a minumum price.

Judge Carter: We have one here in California.

Mr. McConnell: Yes, you have one here in California, and as a matter of fact this matter came up in a companion case to this case—I mean to the Penn Dairies case. The California case came out of the same litigation.

The Quartermaster was buying some milk, or the milk ration for the National Guard Division training at Indian-

town Gap up there in Pennsylvania, near Harrisburg, Pennsylvania, and the state enforcement officer said, "You will have to pay the minimum price going under our regulation," and that's the impact of the case.

Going to the Supreme Court, the Supreme Court said the state has a right to do that.

In analogy, the people say that that case controls us here because it stands generally for the proposition that in certain respects the state can control the price charged for the government; and secondly, it states the general proposition that the mere fact that it's a little bit of an increase in price for the Government will not in and of itself render the state regulation unconstitutional.

Now, thinking about that case in the light of this case, I think we must remember this: In the first place, the milk [fol. 420] regulations are the most peculiar regulations that have been gotten out so far. In Navy against New York they sustained the State's power to fix a minimum price for commodity.

Now, that came out of a situation that is of the nature of things. Milk is a most essential item of health for growing children. It has calcium and everything else. Milk by its nature is very perishable, and in that situation it gave rise to this situation, gave rise to these statutes and to this program, which is particularly on the eastern seaboard, although probably in California as well.

You have these large metropolitan areas that must have their supply of milk, and you have a milk shed built back up of it which is designed to keep a steady supply of good wholesome milk there. Of course milk production varies seasonably as the cows come fresh and you have pastures, and so forth and so on, and you have to maintain enough of a milk shed capacity, enough cows at the down peak to keep up that steady supply. Accordingly, by the rhythmic nature of it, you have a great surplus at any given time. I mean at any particular given time when you have a herd become fresh, and so on.

Well, this surplus will get dumped on the market, and it is perishable, and down this thing goes. I mean, it's just dumped into New York City, and there it goes, and then it becomes very uneconomical for a dairy farmer to main

[fol. 421] tain his herd, and you have the milk shed disintegrate.

Now, it is one thing you have to keep there in close proximity.

There have been philosophies about that milk shed from a number of different quarters. The people out in the Middle West say, "We can make enough milk out here and ship it in to you for it to run out of your ears." But they recognize the fact that in the event of emergency or something like that you want your milk shed close at hand. Otherwise, you tie up your transportation. Accordingly, it is impressed with a very definite local interest to make a milk shed adjacent, have it close to Philadelphia and all that metropolitan area there, make it near. So it is of tremendous importance to the State to keep that thing under complete control.

It is local in nature. It involves health. Now, what did it involve to the Government? It involved a little bit more for one item of the ration.

When you weigh that against the health program of Pennsylvania, it's easy to see the way the scale falls.

Here we don't have any health program or anything like that involved, and you don't have just one item of the ration. We have the whole transportation of the property of the Government.

And there are other reasons here as well where the case [fol. 422] is distinguishable. In that case the United States would pay the same price for milk as anybody else. There is no objection to that. They would just have to pay a higher one in the event they couldn't undercut that, pay the same amount as anybody else.

For these reasons, as I have stated, if this thing is put into operation of necessity in many situations the United States is going to have to pay a higher rate, a discriminatory higher rate, different from the uniform one. That will follow as the night the day. It must be admitted. Now, that is the distinction which constitutes a law which would require the United States to pay a uniform thing, and then bring into operation a statute which of necessity would require a higher one.

In addition to this, this thing of purchasing milk, one fellow can go out there and purchase all the milk at Indianhead Gap or any other place and make arrangements and that will go off in the regular course of payment. No secrecy involved, no extra paper work, none of this stress and strain, administrative difficulties, confusions and frictions which would all be brought about here.

In other words, factually any reflection will show that the situation presented here is distinguishable in any regard from the situation presented there, and we respectfully submit the case in some of its aspects will even support the [fol. 423] government's position.

Judge Carter: Is it your position that the State of Pennsylvania would have the right to regulate the price of milk but not the price of the truck to haul the milk?

Mr. McConnell: Well, that would be my position. The regulative process is very much different.

Judge Carter: I understand.

Mr. McConnell: That is putting it very well. It is. The transportation, we say, is different, for all the reasons we stated.

Of course, if Pennsylvania for some reason just wanted to regulate the milk trucks and not all transportation, that would be different.

Judge Carter: I understand.

Mr. McConnell: The Hughes case, if Your Honor pleases, cited there in our brief, the reasons we felt the Court of Claims gave an ill-considered opinion. The United States has the highest regard for the Court of Claims, as everyone does.

This case came up in a sort of an oblique sort of way on a motion for summary judgment. The facts were not fully developed. A lawyer pushed in there in a surprisingly vigorous manner, and the result came, and the Government has been plagued by that case.

Carriers are even beginning to sue to try to recover old rates, and the civil division of the Department of Justice is [fol. 424] having very much trouble trying to stave these people off until we can get this thing finally decided.

As a matter of fact, down in Texas where we knew the case would be brought up, the civil division of the Depart-

ment, which is different from our department and handles the Court of Claims work, sent a man down there specially just to explain to the judge there how the Court of Claims practice, which is unique in some respect, that this was considered complete both as to the law and the facts, and that certainly the United States, the civil division, pressing the constitutional issue, there fully cooperated in this case and every case.

You will notice that the order opening it says, "This case comes before the court—" and so forth and so on—and the court's opinion says, "For reconsideration of the court's opinion."

Now, we take it that that means the whole thing. At least on the Court of Claims practice, it is well understood that as that case stands now, it stands as persuasive authority, stands just like an appellate case. It would seem to me that the motion to rehear it had been granted.

I think you should always bear in mind that this constitutional issue, to decide it on a motion for summary judgment was probably unwise, and it just was on this enclave thing more or less. But in any event the case stands [fol. 425] as persuasive authority, and we submit that in no sense in its present status is it stare decisis.

Thank you.

Judge Lemmon: We will recess until 3 o'clock.

(Whereupon this cause was recessed to the hour of 3 p.m. this date.)

[fol. 426] Wednesday, February 8, 1956, 3:00 P.M.

ARGUMENT BY MR. MCKEAGE

Mr. McKeage: May it please the Court, I believe that my colleague was in error this morning about the time that he used. He was under the impression that he started at 10 o'clock. He started at 10:10, as I have noted, and I am wondering if this Court would tolerate me for 30 minutes instead of apparently 20 minutes that——

Judge Lemmon: We don't like that word "tolerate"—but we will listen to you.

Mr. McKeage: Thank you, Your Honor.

May it please the Court, I have here a certified copy of the judgment rendered by the District Court of Travis County, Texas, 126th Judicial District, in the case of The Texas and Pacific Railway Company versus Railroad Commission of Texas. It is the same case referred to in the plaintiff's brief by the press release. I have shown this to counsel for the plaintiff and they are willing and make no objection to this being placed in evidence before the Court.

Judge Lemmon: It will be received now.

(Whereupon judgment in The Texas and Pacific Railway Company versus Railroad Commission of Texas was received in evidence and marked Defendant's Exhibit B.)

Mr. McKeage: There was referred to in the government's [fol. 427] brief some quotation from Stonewall Jackson. I do not want to go into history but I must say, as one who is a descendant of a man who marched with Stonewall Jackson, that I am sure that that great soldier would feel out of character if he found his name used in this grand assault by the Government upon the rights of a sovereign state. I did not want to pass without making some remark concerning it.

Counsel for the plaintiff has stated as one of his arguments supporting his claim that the section of the public Utilities Code, 530, is unconstitutional, that there will be great delay, great inconvenience in allowing the Public Utilities Commission to exercise its jurisdiction with regard to the prescription of rates. Well, now, I know that this Court is mindful of the fact that that argument has always been made by the Government based upon convenience and necessity. Some of the cases that I will advert to, the Supreme Court of the United States point's that out, that the argument is made for a centralized form of government, that is, the United States sweep away the rights of the several states if they, according to government counsel, if those rights interfere.

Counsel stated along that line that before the Public Utilities Commission may prescribe rates, may pass upon the reasonableness of these rates, that it is mandatory that the Commission hold a hearing. That is not the fact. Not at all.

[fol. 428] Section 1707 of the Public Utilities Code states that in prescribing rates that the Commission may hold a hearing or it may pass upon the matter ex parte.

It is quite true that the Public Utilities Commission generally will hold a hearing on a major rate case, but we are now getting down to the law of this matter.

It is not the law that the Public Utilities Commission may not prescribe rates without holding some long public hearing on the matter. The section supports my statement, the practice supports it, and the decisions support it.

Now, the principle involved in this case is no different than the principle that was involved in the United Airlines case which we cite in our brief. Both my colleague and I were counsel in that case and we are apprised of the facts. The Government intervened as a plaintiff in the case and it is not true that there was no claim of unconstitutionality of the statute. That is the only way that a three-judge statutory court could be convened as was convened in that case, was upon the claim of the United Airlines that a number of sections of the Public Utilities Act were unconstitutional and oppressive.

I know that that was urged before the Supreme Court of the United States because I was there at the argument. While it is true that that Court peremptorily reversed the decision of the United States District Court, the dissenting [fol. 429] opinion of Mr. Justice Douglas will show what was involved in that case. The argument was made and it was characterized by Mr. Justice Frankfurter during the argument. He said: This is elementary administrative law. The Public Utilities Commission is entitled to pass upon the matter.

The Plaintiffs were objecting to the Public Utilities Commission holding a hearing upon the matter. They contended that was obvious the State had no authority. But nevertheless the Supreme Court of the United States said: The rule of exhaustion of administrative remedies could not be circumvented by any claim of unconstitutionality, delay, great expense, because if that could be asserted that way it would always be circumvented by those claims.

So we maintain that the case of the United Airlines, Myers versus Bethlehem Shipbuilding Corporation, and the

other cases upon which United Airlines case was resting, are authorities for the fact that this is a matter which must be allowed to go through the Public Utilities Commission. And if there a decision is rendered that is not satisfactory, by the process which is pointed out in our brief this matter can be taken to the Supreme Court of the United States and all along the line the enforcement of the statute restrained.

Now, that is the exhaustion of administrative remedies, and we contend that that alone is a bar to the granting of any relief by this Court.

[fol. 430] The Attorney General contends that the only question presented here is one of constitutional power. Well, going to the merits of the case, I can agree, if you forget for the time the requirement of the exhaustion of the administrative remedies and also the primary jurisdiction of the Public Utilities Commission, that that is what is presented and I contend that that is a tremendous issue. If the Federal Government is going to interpose its claimed sovereignty to the destruction of orderly procedure in the states and sweep away the rights of the states, then I contend that that is a tremendous question.

But the difficulty in getting to that, the merits of the case, we have these three cardinal rules of law established by the Supreme Court of the United States in two instances, and in the third instance by statute, that is the exhaustion of administrative remedies before the Commission. The Government was there and participated in these proceedings. There are orders affecting rates which come within the Johnston Act. Instead of exhausting the administrative remedy, the Government comes into this court.

It is obvious why the Government in its complaint made no reference to the proceedings before the Commission. Certainly the Attorney General knew of these rules with regard to the exhaustion of administrative remedies and primary jurisdiction. Obviously if those matters had been [fol. 431] alleged the Government would have stated itself out of court.

But we contend that the Government cannot impose some theory upon this court or upon this defendant that is contrary to the established law and contrary to the fact. We contend that nevertheless the Government may not do that

and by drawing the complaint as it did it cannot ignore the fact and it cannot ignore the law.

Take the case of Ex Parte Young which Mr. McConnell referred to several times. I am well acquainted with that case. That case was unsuccessfully used in the United Air lines case. And why it was unsuccessfully used, is for this reason: In that case a statute was involved that imposed heavy penalties upon one who broke it. The only way you could test unconstitutionality of that statute, and this is the important point, may it please Your Honors, was by violating it. There was no state procedure whereby you could go through a commission, present the matter, get a stay and carry it to the Supreme Court. The only way that statute could be tested was by violating it, subjecting yourself to heavy penalties, and of course that case is very distinguishable from the case here where orderly procedure is provided.

The Government assumes for the purpose of its argument that Section 530 of the Public Utilities Code is unconstitutional. The law will not permit that assumption to be [fol. 432] made. That is something to be determined.

The cases cited in the brief of the Government, many of them are cases where it had been determined that the statute was unconstitutional on its face. That having been determined, then the other results flow. I do not see how it could be determined in the light of the law established by the Supreme Court of the United States that Section 530 of the Public Utilities Code is void and unconstitutional on its face. The law just will not permit that to be assumed. But that is the weakness in the case of the Government, it assumes for the purpose of argument the invalidity of this section of the Public Utilities Code on its face.

The case of Myers versus Bethlehem Shipbuilding Company, which is cited in our brief and is familiar to counsel for the Government, points out just what I refer to, that if a person may come into court, a federal court, and say: "This statute is unconstitutional, my rights are, under the Federal Constitution, being invaded; I will be put to great expense," and I do not have any adequate and speedy remedy at law," and by making those allegations frustrate and circumvent the exhaustion of remedies, as the Supreme

ourt pointed out then there would be no rule on exhaus
on of remedy, it would go out the door immediately.
I do not know why, but the Government in its brief has
ted three decisions and quoted from them that were
fol. 432a] reversed by the Supreme Court of the United
tates. First, it cites from a decision of the United States
istrict Court here in the United Airlines case. That de
sion was reversed by the Supreme Court of the United
tates. I know of no point to a reversed decision.
In the Wycoff case, which was also reversed by the
upreme Court of the United States, that is quoted from at
reat length. For what point, I do not know.
Also a decision of the Supreme Court of this State has
een cited, admittedly was reversed, and I might say in that
ase there was a special federal statute involved there with
egard to some of these military reservations.
Now, I don't want to be disagreeable but I do assert
hat what the Attorney General is baldly trying to press
pon this court is that it legislate by judicial decision in a
ery delicate and sensitive area, State rights, Federal
ghts, where the Congress itself has not seen fit to act in
e premises.
We maintain that even if it be conceded that the Congress
the United States has the authority to preempt entirely
is intrastate field and push the State of California out,
it be conceded that it may do that, the answer is: It has
ot done so. That is another weakness of the case.
The Attorney General should be presenting his petition
a committee of the Congress, not this court.
ol. 433] Those procurement acts which I referred to both
the government brief and in our-, I will not take up the
ourt's time to read what is already in our brief, but those
rocurement acts, given a fair interpretation in line with
e rule of the Supreme Court, just are not acts of Congress
hich show clearly and unequivocally that it was the inten
on of the Congress to preempt entirely the intrastate field.
Now that, of course, is a most delicate operation on the
art of Congress. It is certainly an assault upon the dual
rm of government; it has been approved by the Supreme
ourt of the United States in several cases but we maintain
at even on the merits of this case that has not been done.

Another point that has been made, some reference has been made to a claim that the operation of Section 530 allowing the State of California to discharge its jurisdiction and exercise it would constitute a burden upon interstate commerce. The complete answer to that, Your Honors, is this: we are here talking about rates of carriers, and the Supreme Court of the United States has held in the case of Public Service Commission of Alabama versus the Southern Railway, which is cited in our brief, that wherever that charge is made with regard to intrastate rates that a federal court has no jurisdiction to pass upon that subject until it has first been presented to the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act. [fol. 434] There again you have primary jurisdiction in exhaustion of administrative remedies. The only way a federal court could ever reach that question would be after it had first been presented to the Interstate Commerce Commission.

So that point raised by the Government is disposed of by that decision and certainly well within the established rule of exhaustion of administrative remedies.

So this matter boils down, to this, as I see it, on the merits, that under the Federal Constitution ex proprio vigore the provisions of that Constitution exclude the states in that field. We contend no act of Congress has been passed on the point, so the Government's case must rest on the merits upon that: Does the Federal Constitution by its own force and vigor exclude this sort of thing? We contend that the cases are very contrary to that contention.

Another point is this: Counsel for the Government states that in the interstate field the Interstate Commerce Commission under the Interstate Commerce Act has no jurisdiction over rates charged to the Government for transportation. I deny that. And the Supreme Court of the United States denies it. And in the Hughes case those decisions are pointed out, that Section 22 of the Interstate Commerce Act, which gives permissive authority to the carriers to charge reduced rates to governmental bodies, is controlled by the section of the Interstate Commerce Act [fol. 435] which prohibits preference and prejudice, holding that the Interstate Commerce Commission may regulate

those rates now charged to the Government if it finds after hearing that it constitutes prejudice. So the United States is not absolutely free even in that field.

It will be interesting, I am sure, to government counsel, to be told that the Public Utilities Act, so far as telephone services are concerned, gas and electric service, water service and the like, makes no provision for exempting service that may be furnished to governmental bodies. But—and I am glad to say this and it will illustrate the attitude of the Commission which I represent,—it has for years a general order which grants to that type of utility the privilege to charge less than the tariff rate.

Now we get back to the question of what the Commission would do had it not been frustrated by this proceeding. The Commission fully expected either the Government or the carriers, the shippers, to file an appropriate application to the Commission and the Commission would pass upon it. The record of the Commission shows that it has always been very alive to a situation of that kind.

Now to take it on the other hand, the statement of government counsel that what the Commission would do would be to load onto the United States of America a tremendous burden, frustrate it, require it to reveal secret information, just not appeal to reasonable men. That Commission would [fol. 436] do nothing of the kind, would do nothing to require the exposure of confidential data or anything of that sort that would be contrary to public interests. Those are arguments in terrorem, which judges and courts are familiar with: do it my way or the heavens will fall. And I am reminded of a statement that was made by a justice of the Supreme Court when he said: If mankind should wait until some plan or scheme should be devised against which no valid criticism could be directed, that human progress would stop on dead center.

Well now, assuming everything against the Public Utilities Commission, that it would act contrary to the public interests, of course a case can be made. But we must presume that a body of that kind will act lawfully and alert to the public interests.

Some point has been made with regard to the increase of the government's bill for transportation. Of course, the

statements by the Attorney General are just statements, they are not the record at all. It is conceivable that it might increase the rates, but I do not believe that history will indicate that is the case with regard to other public utilities service here in the State of California where the Commission has been given a discretion to authorize less than tariff rates. The history is that it has allowed less than tariff rates, the Government has not been blackjacked in any way [fol. 437] or injured. There is no reason to believe that it wouldn't act the same way here.

I might say, if it please the Court, that these same arguments were made in these cases which I have referred to, the Wycoff case, the United Airlines case, the Myers versus Bethlehem Shipbuilding case, and the Supreme Court of the United States has recognized that those arguments will be made. Take, for instance, the case of Davis Warehouse Company versus Bowles—it may be the other way around, but it is cited in our brief. There was a case that came before the Supreme Court of the United States in time of war. Full war power was asserted in support of the Government's position. The Government there said—I mean, the Supreme Court said, yes, we realize all of these arguments of convenience and necessity but we also realize that we have a dual form of government. We realize that our government was based upon a compromise, and also pointed out that these annoyances that the Government complained of there, that the Price Administrator had to do a lot of searching of states' statutes and things like that, we realize all that but it is a very small price to pay for orderly procedure in government, and rejected the Government's contention there.

Now, I may be an oldfashioned person. I believe in the rights of the several states. I sincerely do. I say that in no sense of emotionalism. I believe that that is the thing [fol. 438] that must be constantly called to the minds of all public officials. That is just as important now as it was when this government was formed, that those principles be adhered to. And I am reminded of another decision of the Supreme Court of the United States, in the case of Poulos versus New Hampshire, that is cited at 345 U.S. Reports 395 and particularly page 409.

There an argument of inconvenience was made about exhausting the administrative remedy, and that court said that this delay, this litigation was just one of the small prices that we have to pay for living in an orderly society. We assert that if these matters were more attended to, orderly procedure, and less effort put behind centralization and placing the federal power above the state power, that we would have probably less national and local ills.

I know that it is sometimes laughed at when one speaks of these things, but I maintain that the Supreme Court of the United States, proven by reading their decisions, still believes in that. You can go back to the case of Ex Parte Milligan and there you can read the brief that was submitted by General Butler and you can read the decision of the Supreme Court in answering the contentions therein made and you find the same pattern there as you do here. It is the same argument that is made, that these matters must be moved out of the way so that the Federal Govern- [fol. 439] ment can move on, and the Supreme Court has steadfastly refused that sort of thing unless there was a statute of Congress clear and unequivocal or in some very extreme cases where there was no applicable law but where, for instance, there was a matter which the court felt was so high and so important that it held that the Constitution*al* itself would go into the field.

I see that I am getting pretty close to my 30 minutes and I want to say this in closing, that the United States and the states insist upon regulation of rates of public utilities. That is an established national policy, it is an established state policy in practically all of the states, and as the Court of Claims said in the Hughes Transportation case that it is odd that government which insists upon regulation of others would not want to submit to regulation for itself, and you will notice in the Hughes case the number of decisions of the Supreme Court of the United States which are cited which say in effect: Government when it becomes a shipper is like any other shipper.

Now we hope that we haven't got to that sad state where government says: Do as I say and not as I do.

And I would like to quote the very eloquent language of Mr. Justice Jackson, speaking for the Supreme Court of

the United States in the case of Davis Warehouse Company versus Bowles, which is cited in our brief, wherein the court, in answering the argument of the legal representatives of [fol. 440] the Federal Government passed on to the court under the war powers, had this to say, said the court:

> "State statutes like federal ones are entitled to the prompt presumption of constitutionality until their invalidity is judicially declared."

And then in response to the argument that was made, just like the argument made here today, that if this were allowed the Price Administrator would have to go into a great number of state statutes, would have to make decisions upon fact and that sort of thing, the Supreme Court said this:

> "It is also objected that if we consider the status of an industry under state law, the Price Administrator would have to scrutinize and differentiate many kinds of franchises. Thus the Administrator, as incident to the task of price control, would be called upon to determine in any number of particular instances questions of state law which require the most painstaking examination of statutes and decisions.' We are not prepared to deny that in some degree this will be true, for we do not hold that all warehouses, or even that all warehouses regulated in some aspects, come within the exemption. We think the Administrator will have to form judgments and that they will be judgments of [fol. 441] some difficulty. Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent."

And then quoting further, the court said:

> "Local institutions, customs and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the

task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsided to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that 'the extension of federal control into these traditional [fol. 442] local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions."'"

I would say just one final word, the complete answer to e Government's contention here is simply this, over and ove these procedural matters, rules of exhaustion of ad inistrative remedies, the Johnson Act, is that the Congress s not entered this delicate field, and a reading of those rocurement statutes upon which the Government seems to ly I am sure will convince this court that the Congress s not.

We are willing to submit our case upon our brief and on this argument.

Judge Lemmon: The motion will stand submitted.

Mr. Poe: May it please the Court, might I inquire as to e action of the Court with respect to the motion to inter ne and——

Judge Lemmon: We haven't passed upon that as yet. It under submission.

Mr. Poe: Well, incidental to that, would the Court enter in any comment at all on behalf of the intervener with spect to the motion of the defendant?

Judge Lemmon: Don't you think that the question has en amply presented?

Mr. Poe: I can't say that I criticize the presentation. ol. 443] I certainly agree with everything that counsel for e defendant has said.

Judge Lemmon: How long will you take?

Mr. Poe: I would conform to the Court's desire in that respect. I have no desire.

Judge Lemmon: Ten or fifteen minutes?

Mr. Poe: Not that much.

Judge Lemmon: Very well, we will hear from you.

ARGUMENT BY MR. POE

Mr. Poe: Thank you very much.

By way of introduction, if the Court please, the interest of the proposed interveners here, of the common carriers by motor vehicle, is more than academic. It is obviously economic and substantial. We are concerned and I want to say, as I have just indicated, that we do concur in the arguments advanced by counsel for the defendant, and I have no desire to reiterate any of their arguments.

We agree likewise with counsel for the Government that with respect to the merits or the sufficiency of the complaint to state a claim for relief, that it is a narrow issue, that is, the constitutionality or validity of Section 530 of the Public Utilities Code and the corresponding or related sections. We agree likewise that if the statute is void or unconstitutional on its face that there is a valid claim for relief.

So far as that statute is concerned, there has been plenty [fol. 444] of discussion today concerning its contents but I think it might be noted, as has not been called to the Court's attention, that the amendment of 1955 did nothing more than to remove that permission which common carriers had theretofore, to charge less than their tariff rates to the Federal Government, to the State Government, to the County and Municipal Governments of California. That was removed as to all those governmental agencies. There was no discrimination against the Federal Government, but in addition to that the Legislature made adequate provision for administration of the regulation of rates as applied to those governmental agencies by the Commission, and I think that the crux of the merits of this case may be found in that in that subject, that there is no reason for this court to presume that the California Public Utilities Commission will not regulate the rates to be charged by common carriers to the United States Government or to the State Govern-

ment for that reason, except upon a proper and reasonable basis, and to presume otherwise would be to exceed the proper bounds of the jurisdiction of this court.

We believe that the complaint must stand or fall on the single issue as counsel for the Government has stated: Is it on its face an unconstitutional invasion or encroachment of the rights of the State of California?

Now, counsel for the Government at great length dis- [fol. 445] cussed what he asserted to be facts concerning the results of the outcome of the administration of this amended statutory scheme in California. It is not my intention to attempt to correct counsel in any respect concerning his statement of what the facts are. I am content to state to this court that he did not state the facts with respect to the rate structure of the common carriers in California or the experience of carriers in this state with the regulation of the statutes affecting common carriers by this Commission, by the Commission correctly, but I don't care to create any issue because those facts are not before this court, and suffice it to say that even assuming, which I do not grant or concede, that the statutory scheme in California as amended in 1955 will cost the United States Government any more for its transportation, that is not to be conceded, and there is no evidence upon which this court can assume that.

But assuming that that is a fact, the Supreme Court of the United States, speaking through Chief Justice Stone in the Penn Dairies case answered that point:

> "If the State constitutionally exercises its police power reserved to it in the regulation of common carriers in the transportation of property in intrastate commerce within its jurisdiction, exercises that power lawfully, the mere incidence of additional cost to the [fol. 446] Federal Government does not result in an unconstitutionality of the statute."

I am not contending to analyze the Penn Dairies case. I am well aware that Your Honors have read it. And I think it only need be said that the discussion of the Supreme Court in that case answers fully all the arguments advanced on the merits by counsel for the Government here today, every single one of them, and to ask this court to de-

edit that a ground for relief here is shown by this complaint is to ask this court to overrule the decision of the Supreme Court in the Penn Dairies case.

Now, to say that the regulation of the price of milk is unusual is not to answer the holding of the court. In fact, it is an argument that I believe is stronger, as applied to this case, than in the regulation of the price of milk. The regulation of the price of milk is relatively new to the law. The regulation of the rates and operations of common carriers is as old as the Constitution.

There is only one other subject that I wish to comment on briefly. Counsel made a good deal of point, great point of the fact that for generations, 150 years or more, clear back into England, it has been recognized in the law that transportation performed for the sovereign is not to be subject to regulation. Now, I deny that. True, there have been in this country in the various state statutes and in the Interstate Commerce Act provisions for the assessment by carriers of [fol. 447] rates less than their published tariff rates for the United States Government, but that does not mean that the law has recognized any immunity of the Federal Government from regulation, and I would like to call the Court's attention to one case, only, on that subject, not meaning that there are no others. But this one case is, I think, conclusive. I am not sure that it is cited in the defendant's brief but it is included in a quotation in the defendant's brief, the quotation from the decision of Penn Dairies case, and that is the case of Baltimore & A.R. Company versus Lichtenberg, 176 Maryland 383, and approved by the Supreme Court of the United States in U.S. versus Baltimore & A.R. Company in 308 U.S. at 525. That case is adequately discussed in the Hughes case. It was a case in which the State of Maryland ordered a passenger carrier to cease operations in the transportation of military personnel for the Armed Forces because it had no right to do so under the laws of the State of Maryland. In other words, it had not been granted the requisite authority to provide transportation service and it was ordered to cease its operations. The United States Government participated in the case, and on petition for writ of certiorari to the United States Supreme Court the writ was denied (at the place I cited, 308 U.S. at

525) with a per curiam decision that no federal question was involved, citing other cases.

Now, if a State can determine who shall provide trans- [fol. 448] portation and that exercise of power is not an encroachment on the powers of the Federal Government to maintain an army and a navy, then by what imaginary theory can it be said that it does not have the power to regulate the rates of that transportation service?

We believe these questions are all answered in that case, in the decision of the United States Supreme Court in the Penn Dairies case, and we don't accept the Hughes case as a final determination of the question. We certainly believe that it contains a resume of the principles that are involved and the cases which must determine the issues in this particular case.

Thank you.

Mr. McConnell: May it please the Court, I don't know whether this is the appropriate time or not, we have in fact a problem in connection with this case we may bring up before Your Honors at this particular time. Depending upon whether or not Your Honors decide that the final hearing will be necessary in this case, I take it you take the motion to dismiss under advisement and the motion for interlocutory injunction. If a final hearing is to be held, dependent upon Your Honors' disposition of the cross-motion, the Government at its final hearing had planned it would be a simple hearing of about two days, I take it. In Texas it took us two days, and there we had additional witnesses [fol. 449] from railroads and so forth. It happens that the principal witness of the Government—of course, the Government will bend itself to the convenience of the Court indeed. The principal witnesses—the second man in the Army Transportation Corps, General Lasher—his particular job is to travel around everywhere, to all of these installations—it is more or less a field survey job for the headquarters of the Army, and his schedule is pretty tight and he needs some notice to keep him from conflicting with something that might be quite important, and there are other witnesses as well. We have one other witness from Washington, who is a representative of the railroads there. Otherwise, we plan to submit witnesses who are local men in these various

installations in California just to tell the practical prob
there are three or four of them. General Lasher had
himself available. We told him we couldn't tell how
convenience of the Court would be for the week of M
5th, if a final hearing would be held, and, if the C
pleases, if it would be necessary to have a hearing at
time other than that—and we of course are at the Co
pleasure—if we could have enough notice to get our
nesses, who happen to have a lot of other commitments
would appreciate very much if we could have the Co
indulgence.

(Discussion among members of the Court.)

[fol. 450] Judge Lemmon: Judge Carter has sugge
that we make an order continuing the restraining orde
effect until the Court rules upon these motions.

Mr. McKeage: We have no objection to that, ma
please the Court.

Judge Lemmon: The order will be entered.

[fol. 451] In the United States District Court for the Northern District of California, Southern Division

Before: Hon. Dal M. Lemmon, Judge. Hon. Oliver J. Carter, Judge. Hon. Oliver D. Hamlin, Judge.

No. 35101

United States of America, Plaintiff,

v.

Public Utilities Commission of the State of California, Defendant.

Reporter's Transcript

Proceedings on Trial

Monday, March 19, 1956

Appearances:

For the Plaintiff: James E. Kilday, Esq., E. Riggs McConnell, Esq., John D. Wigger, Esq.

For the Defendant: Everett C. McKeage, Esq., J. Thomason Phelps, Esq., William R. Roche, Esq.

[fol. 453] The Clerk: United States of America v. Public Utilities Commission of the State of California.

Are both sides ready?

Mr. McConnell: The United States is ready, if the Court please.

Mr. Phelps: Ready.

Colloquy Between Court and Counsel

Judge Lemmon: We thought perhaps it might be of some assistance in shortening the trial of the case if we had a sort of pretrial at the present time. I am suggesting to counsel in the case that if there are any stipulations that either side desires from the other, or if there are any ad-

missions that you wish to request, we would like to have you do so now.

Mr. Phelps: One occurs to me, Your Honor. The defendant has had prepared with a team of about eight men working for the past several weeks a summary of what we hope will reflect the pattern of government traffic in California. That has been made up by these men, having examined the shipping documents of a large number of carriers operating in California. What I hope to be able to do is to have one man who is a member of the staff of the California Public Utilities Commission testify in support of that summary, which we will offer as an exhibit, and I will have present, if it appears to be necessary or desirable, more, or, if required, all of the eight men who contributed to the [fol. 454] preparation of that report. Four of those men are in the Commission's Los Angeles office, working out of that office. They have been alerted so that they can come up here.

Judge Lemmon: These are summaries from records in the Public Utilities Commission's office?

Mr. Phelps: No, Your Honor; they are summaries of records in the offices of the various carriers. I can have one of the men of the eight who actually took off the data from those working papers here, but if it is possible, I should like to avoid bringing eight men who will testify to virtually the same thing.

Mr. McConnell: If the Court please, we have not had any discussion on this study, whatever it may be. I have no conception of what it is. I gather it is some sort of deduction from an examination of a number of shipping documents. We do not, of course, want to do anything that will prolong or make this trial tedious, but we do not see at this stage of the game where we can in any way make any arrangements with respect to that.

Judge Lemmon: All right. I will make this suggestion to you. If we have a little recess here, you might go over those compilations and familiarize yourself with their contents and scope, and then you might be prepared to stipulate that if those witnesses were called, they would testify thus and so, subject to any objections you might have to the [fol. 455] evidence.

Mr. McConnell: May it please the Court, if I understand the nature of this study, of course we will explore it, but I have a general feeling that it is going to be a rather futile effort to go through all that mass of material, if I understand what it is.

Mr. Phelps: It will be reduced to summary form. I regret I do not have it here. I believe it is still being worked on. It has not come off the press yet. It will be ready, I believe, tomorrow. As soon as it is ready, I shall be happy to make a copy available to counsel.

Judge Lemmon: Judge Carter makes the suggestion that if it does come in, it comes in on the defendant's case, as I understand, and so you will have ample time to look it over.

Mr. McConnell: Yes. There is one aspect of the case which we are prepared to prove. It is not an essential part of our case. It is, in a sense, ancillary to the main part of our case. As the Court may remember from reading our brief in connection with the motion to dismiss, we bring forth the idea that a great many shipments in California or some shipments in California are from areas that are within a federal jurisdiction. It is a very confusing concept as we have delved in it, particularly where they terminate in an area that is within a federal jurisdiction. [fol. 456] The only point that we make of that is that that is a rather confusing state of law at the present time, and under the cases we feel that we should put it under a case that came up in California and a case that came up in Pennsylvania. I do not think that there is very much doubt about the decisions on the matters that are within the claim of federal jurisdiction. However, we have not been able to get any stipulation on that. Probably we can not. That part of our proof we have cut down so it will take an hour at the most. We feel it is probably better to go ahead directly with that. That is the only area we thought we could stipulate with respect to.

Judge Carter: What do you mean by that? The volume of the material that moves from one government reservation in California to another government reservation?

Mr. McConnell: No, sir; we are not concerned with the volume. We were concerned with the nature of the enclaves,

how they were held by the federal government, whether they were exclusively federal jurisdiction, and then the general proposition that some traffic, an indeterminate amount of traffic, that moves from these various types of jurisdictions.

Judge Carter: Your testimony will go to the nature of the enclave, is that the point?

Mr. McConnell: Generally, the nature. We will have witnesses from the engineer's office. I think the total impact [fol. 457] of the testimony is that there are some of the older ones that are clearly within it. There is an area where there is doubt, but at any rate it will contribute to the confusion of our problem in trying to comply with any state regulation.

Judge Carter: The question that occurred to me, and I want to ask this of Mr. Phelps, has this proposition been explored by the Public Utilities Commission?

Mr. Phelps: Yes, Your Honor, it has. This matter, as counsel has suggested, has been the subject of some correspondence between ourselves and in his letter to us Mr. McConnell outlined the subject matter with respect to which he proposed and requested a stipulation. We looked at it very carefully and replied at some length to Mr. McConnell, setting out those points on which we thought we could stipulate—I believe there's only one—and those upon which we felt we could not, the reason being, as we said in our letter, that this entire matter of whether or not the federal government has exclusive jurisdiction over certain installations in California and other states is a very vexed and highly controversial question. So we felt it would be inappropriate for us as public officers to be stipulating upon a matter with respect to which we had no knowledge ourselves and with respect to which, as I understand the law, there is an agency of the State, the State [fol. 458] Lands Commission, has certain jurisdiction over that matter, and presumably have been advised by the Attorney General, so the result is we felt we could not appropriately stipulate in that respect.

Judge Carter: But for the purposes of this hearing, is there going to be any contest as to the nature of the enclave and the rights and duties that flow from that?

Mr. Phelps: As I understand the plaintiff, they are preparing to argue that movement from one federal enclave to another is equivalent to interstate commerce and therefore beyond the jurisdiction of the state.

Judge Carter: Is there going to be any argument as to the nature of the enclave concerning that point?

Mr. Phelps: I think there may be, yes, Your Honor. I would suppose.

Judge Carter: The reason I am asking it, does the State intend to make any argument? I know you are going to resist the general argument, you're going to resist the general point that transportation from one federal enclave to another one inside of California is in the nature of interstate commerce.

Mr. Phelps: Yes, Your Honor.

Judge Carter: That's the point at issue which you are permitted to argue, but can't some agreement be arrived at that regardless of the nature of the federal enclave and from its source of power and without committing the State [fol. 459] of California to the nature of the enclave that there is a federal enclave at such and such a place, and another one at such and such a place without regard to its nature, and that the government of the United States contends that there is transportation between those two places and that that raises the issue, period, without deciding the nature of it.

If that could be done, I think it would materially help in the presentation of the case. However, if the State is going to take the position that by reason of the nature of the enclave, that may have shed some light on the argument, why, then, of course, that's another matter.

Mr. Phelps: Yes, Your Honor. We certainly are anxious to expedite this matter and we don't wish to pose any artificial obstructions in the way of the plaintiff's proof. However, we were satisfied after examining this question, —I have in mind particularly that Pacific Coast Dairy case decided by the United States Supreme Court a few years ago in which, in that case, as I read it, there is room for differences of opinion—but as I read that case, it turned upon the fact that the sale and delivery of milk occurred

on physical terrain that was within the exclusive jurisdiction of the federal government.

Now, that is a very narrow technical ground upon which a case of that magnitude should turn, but it did, as I read it, [fol. 460] . Now, in view of that case, we thought it would be inappropriate for us to stipulate that here in California, with respect to other installations, that there were installations that were under the exclusive jurisdiction of the United States, and that there was traffic moving back and forth between them. We just don't know, Your Honor.

Mr. McConnell: If the Court pleases, with respect to that, I appreciate the position of the Commission in that regard because as we went into it more thoroughly, it is a rather complicated thing. It is more or less in the jurisdiction of the Lands Commission and we have been in touch with the Lands Commission and we have tried to work out a very simple form of presenting our particular position with respect to this thing to the Court.

As I say, it is not the main thrust of the government's arguments, which is, these regulations constitute an interference with the supplying of the armed services, but we feel we should have some part of that in the record, but it will be a very small part indeed.

Judge Lemmon: It was our thought if you could stipulate to considerable of the facts without, of course, committing yourselves as to the conclusions, it would materially shorten this trial.

Mr. McConnell: Of course, anything that we could do in that regard, the government would assiduously, the United [fol. 461] States would assiduously want to do it. It's a rather difficult matter to enter into stipulations of fact in a constitutional law question here, and a lot of it is a matter of what will happen.

Judge Lemmon: In this type of case often considerable is offered in the nature of reports, documentary evidence.

Mr. McConnell: We have no documentary evidence. If the Court pleases, if I may just briefly outline the theory of our proof.

This is a question of tremendous importance to the government. It is one that we feel is going to be determinative of a general principle which will be applied on a national

scale. We want to have as full a presentation as possible and if we did, we want to be on the side of unfolding every aspect of the matter. I don't think there is any question on the fact that ultimately the Supreme Court will pass on this case, and in preparing it, we have adopted this theory.

We have tried to get men from the military service, the best qualified men that we could get, that are familiar with government transportation problems, military transportation problems, the supply lines, and we are putting them on the stand and letting them describe the military supply lines in its operations. We would have them point out concretely how state regulations in any State would interfere and obstruct the supplying of the armed services. Spe- [fol. 462] cifically, we are represented from the national point of view, because it is a national case, we have the Assistant Chief of Transportation for the Army as our witness to testify on the over-all picture of the supply lines and the world-wide and nation-wide functions.

Then we will have the best qualified men we can get from the various installations in California, the officers in charge of those installations, or some of the most important ones; Stark General Depot is one, Oakland Navy Depot, the Marine Corps Depot, or the Marine Corps Traffic Control Office here in San Francisco, which controls the Barstow operation, the officer in charge of Mira Loma, the Air Force installation; charged with the supplying of the Air Force, and we are having a very brief presentation of the problem which would be presented, statute of this sort, either in California or elsewhere, with respect to their particular operation.

With them we are having the particular specialists that are associated with them that have had long experience in California traffic management, bring out of their files specific illustrations that will show how a regulation of this sort would indeed enhamper the discharge of the military function.

With that we will have a specialist in Washington who is in charge of negotiation of rates for the government on [fol. 463] a national level; we will have a representative of the railroad who is a security-cleared man, Western Railroads, who enters into these arrangements in Washington.

There is also one witness who has voluntarily come here from Texas. As the Court knows, this question has become one of national importance. I might say that since we have been here Tennessee has also—the issue has been presented by Tennessee by a request of a carrier there to the Commission for ruling on whether or not they have jurisdiction over intrastate shipments of military materiel.

The issue is in Texas, it was precipitated there in November. The court has enjoined, the State District Court of Texas. That appeal has been set. It was an appeal by the State of Texas to the Court of Civil Appeals in Texas. The argument on that appeal has been set for April 11, and we will proceed from here to Texas to present that argument.

The cases in Pennsylvania, Texas, Tennessee and other States as well are being held more or less in a state of suspension pending the resolution of this particular case here. And a witness from Texas who made a very deep study of the whole problem, we are going to present here. That is the only witness of that character we have, and that testimony will be very brief.

Judge Lemmon: I suggest that as we proceed, if either counsel find they may stipulate in this matter that will, [fol. 464] shorten the testimony, the Court would appreciate it very much.

Mr. McConnell: We certainly will. We have made every effort, as I say, to keep this thing as simple and as direct and short as possible.

Mr. Phelps: We will keep that in mind.

Judge Lemmon: Proceed, then, to call your first witness.

Mr. McConnell: General Lasher.

EDMOND C. R. LASHER called as a witness by the plaintiff; sworn.

By the Clerk:

Q. Please state your full name and title to the Court.

A. Edmond C. R. Lasher, L-a-s-h-e-r, Brigadier General, United States Army.

[fol. 465] Direct examination

By Mr. McConnell:

Q. What is your present position, General Lasher?

A. I am Assistant Chief of Transportation of the Army for Traffic.

Q. How long have you been concerned in military transportation matters?

A. Approximately 20 years.

Q. Will you briefly state to the Court your background and experience in military matters, generally, and particularly in military transportation matters?

A. I am a graduate of the United States Military Academy and was first commissioned in the Quartermaster Corps of the United States Army. At that time the Quartermaster Corps had the responsibility of supply and distribution of practically all of the supplies of the Army.

About 1936 I was directed to specialize in transportation matters because most of our transportation people were being retired or relieved from the service for one reason or another. I was sent, first of all, to a tour with the railroad industry. Following that, two tours: one here in San Francisco and one in New York, to study the inter-relation between land and ocean transport.

In 1938 I went to Washington, D.C., in the office of the Quartermaster General, where commercial traffic for the [fol. 466] Army was handled.

Since that time, with a few exceptions, I have been in the commercial traffic field for the Army.

Q. Can you briefly explain to the Court the duties and the responsibilities of your present position as assistant chief of transportation for the Army?

A. As Assistant Chief of Transportation I am responsible for the procurement, world-wide, of all commercial transportation services by all modes.

Q. General Lasher, in connection with your duties, do you sit on joint committees and staff committees with the other arms of the services?

A. I do.

Q. Are you authorized to speak as a witness for the Department of the Defense and the other services?

A. As a matter of fact, I am representing the Department of Defense as well as the Army this morning.

Q. General Lasher, to what extent does the Department of Defense and the various armed services use commercial carriers?

A. The policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible. This policy has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved.

[fol. 467]

Q. Is it then in the interest of the armed services to have a strong commercial traffic fleet? Is that correct?

A. It is.

Q. General Lasher, how do you select the modes of transportation for the armed services?

A. The first requirement, of course, in all of our transportation is to select that carrier within that mode which best accomplishes the requirements of the particular traffic involved. The needs of the government are, of course, paramount. Secondarily, the question of cost is involved; and thirdly, division of traffic amongst the carriers who are able to carry it.

Q. Do you feel that there is a distinction as far as transportation requirements are concerned between industrial, commercial traffic and military traffic?

A. There is some similarity, yes, sir, but there are many, many points of difference between commercial requirements for transportation and military requirements for transportation.

Q. Could you explain to the Court your meaning in that regard?

A. The movement of goods in commerce in the United [fol. 468] States have over the years formed a rather consistent pattern, and as industry has shifted and population shifted, it has been on a rather gradual scale and has been somewhat predictable, and before industry does shift or disperse it pretty well plans that shift. The items moving

in commerce today and in industry form also a good pattern as to their kind. The military department, on the other hand, has a requirement which is dictated not by planned movements of industry or of people, but are planned, if you will, by forces outside of the United States, planned or at least set by forces outside, and the military is forced on sometimes no notice whatsoever, to shift itself to best meet those outside forces. So while we attempt to plan as best we can, we find that an occurrence in a far corner of the world is liable to change our plans quite considerably, and therefore we must shift ourselves and our logistic system to supply our people in overseas areas accordingly.

Also, of course, we not only encompass in our transportation the usual things that move in commerce today,—we ship shoestrings, toilet soap and eggs,—but we also ship all of the materiel and machines of war. So the catalogue of our supplies encompasses not only practically everything which moves in industry, but encompasses also all the materiel of war. Those are two very important differences, I believe, between our traffic and the traffic of in- [fol. 469] dustry generally.

Q. Do the commodities, then, in the military traffic compete with commodities in commercial traffic?

A. They are never in competition. As a matter of fact, oftentimes they are moving opposite to the flow of commercial or industrial traffic.

Q. General Lasher, will you briefly describe in a general way the supply lines of the United States, with particular reference to the logistical requirements and the military requirements?

A. In order to supply our forces world-wide, the logistics system of the Army—and I will speak to the Army in particular, but my remarks will in essence apply to the other services—the Army has set up a system of depots or supply points. These are divided into two main classes. One depot we call a general depot. It will store and distribute items of more than one of our technical services, such as the Engineers, the Ordnance, the Quartermaster, and so forth.

In addition to the general depot, we have the so-called branch depot, which is a storage point for one particular

part of our technical services, such as a Quartermaster depot or an Ordnance depot. These storage points and distribution points are so located as to be interdependent one with the other, and are so located as to form a line of supply in direction from consumer or, rather, from manufacturer [fol. 470] to ultimate consumer. So that once goods are manufactured we may place them in the supply chain and they will be on their way toward ultimate consumption, rather than to place them in the heterogeneous pattern calling for cross-haul, back-haul and so forth.

This system amongst the various supply services of the Army is coordinated by the Deputy Chief of Staff for Logistics of the Army, who controls the flow of these supplies and coordinates them with the requirements of our continental United States and our overseas commands.

Q. I take it, then, that you have a depot system which has supplies stored all over the continental United States, is that correct?

A. That is correct. But if I left the impression that every depot stored all supplies, I did not mean to. They are stocked in these depots according to the requirements of the area in which they find themselves or the area beyond in foreign countries.

Q. Is the dispersal of materiel for the purposes of defense against air attack a factor in the location of these depots?

A. Very much so; particularly in these days of mass destruction weapons, we have paid more and more attention to the dispersal of our storage points so that we will not have all of our eggs in one basket. If a particular storage [fol. 471] point is destroyed, we have other storage points which can fill that gap. We spread them accordingly. We try to place them in places which are less attractive as a target to any enemy.

Q. Does a consideration of congestion at any port area or other transit point come into consideration when you locate the depot?

A. It most certainly does. As a matter of fact, World War I provided us with a shocking example of what can happen if transportation moves unrestrained to points which become potential bottlenecks. New York, for instance,

was the main outloading port in World War I, and traffic moved through it unrestrained, uncontrolled, with the result that we had loaded railroad cars backed up in some cases as far as Chicago. Not only did the supplies not reach the troops, but the cars were being used as warehouses when they should have been used as transport media. So when World War II came along, we very definitely decided that that could not happen again, and in order to prevent it from doing so, we established behind the ports about a hundred or two hundred miles what we called holding and reconsignment points. They started at Schenectady, New York on the northeast, and around the boundaries of the country up to Auburn, Washington. These holding and reconsignment points actually acted as surge chambers for [fol. 472] this traffic moving to ports.

The bottleneck was shipping in World War II, the availability of the tonnage to move on the water. We know all about the tremendous losses we had in the Murmansk run before the war actually started, and as ship convoys came back to the United States, they had radio blackouts and we did not know until they arrived in port how many ships they had, how much tonnage would be available for us to load, and we were loth to move from an inland origin any traffic which we were not sure could be loaded onto a ship in New York. Otherwise it would back up.

But there were many cases in which of necessity we had to start the traffic from an inland origin before we were actually sure. If the tonnage did not show up at the port of loading, then we used these holding and reconsignment points to put this traffic, unload it, and release the cars for other shipments, holding the shipments until a bottom did become available.

So these holding and reconsignment points, as I said, became surge chambers and sometimes they had a good deal of tonnage in them, sometimes not much. The ideal was to ship direct to port, onto the ship, and out. The ports were held as transit points only and not as storage points.

So we were dictated by the force of circumstances to establish even another series of depots, these holding and [fol. 473] reconsignment points. We did not have one behind each port. The one at Schenectady could serve any

one of several ports from Portland, Maine down to Ph
delphia, and our traffic arrangements with the carriers
to encompass the use of that holding and reconsignm
point at Schenectady. So regardless of how the traffic
originally consigned, it would go through Schenectady
then would be like a hose spread to any one of the ports
which we might have ships available to move it out.
convoy may not have come into New York. It might h
gotten into Portland or Philadelphia. So we had to re
that flexibility in these holding and reconsignment poi
so this traffic could move wherever we had the tonn
available.

That was a very important thing during the war. It
so badly mixed up in World War I, and our tonnages w
vastly greater in World War II, that we had to be sure
would establish a similar system if, heaven forbid, we
to have World War III and we would have a similar
cumstance.

Q. What was Sharp?

A. Sharp was originally built as one of these hold
and reconsignment points. It might again be a holding
reconsignment point or another one might be built. Sh
was one of the original ones.

Judge Carter: Sharp is located where, generally spe
[fol. 474] ing?

The Witness: Near Stockton.

By Mr. McConnell:

Q. Do you pay any attention to State lines or geogra
ical State boundaries in the location of these depots?

A. In our depot system?

Q. In your depot system.

A. No, we can't. This map here, the red lines on
map, show our Army areas, for instance. There are ot
lines, less distinguishable which give the Navy and
Force areas continentally. We have six army areas
(pointing).

Mr. Phelps: Just a moment, if I may interrupt. Th
all very interesting, Your Honors, but I am beginning
wonder how it has any relationship to the issue which

raised in this proceeding, which I believe can be described as a question of whether or not state regulations impose any unreasonable burden upon the government, upon the movement of government traffic in California. I am not yet certain what this is leading to, but it seems to me at the present time it is far removed from the issue which is raised in this proceeding.

Mr. McConnell: If the Court please, this is a question of constitutional power, a general question of national scope. Our complaint sets it out. We are trying to sketch the matter.

[fol. 475] Judge Lemmon: That was just an observation of counsel without objection.

The Witness: May I proceed?

Judge Lemmon: You may proceed.

The Witness: Although we have these arbitrary Army, Navy and Air Force boundaries and we have, if you will, arbitrary State boundaries, nevertheless our pattern of traffic can not be fixed by these boundaries. Our pattern of traffic, as I say generally, must follow the flow of requirements. That flow of requirements must generally be from a producing area through to a consuming area, either in the West or on the far shore in, let us say, the Far East, in Japan.

Similarly, we can not be bound by boundaries of any kind. We are bound by the ability of traffic to move. That means the highways, the railroads, the general flow of traffic through the ports, just as this holding and reconsignment point at Schenectady, New York was located here. It was not located with any regard whatsoever to state boundaries of New York or the boundaries of the First Army. It was located with an ability to transship to all of these ports.

Q. General Lasher, does material flow through the depot system that you have described at a very fast rate?

A. We sincerely hope it does.

[fol. 476] Mr. Phelps: Just a moment. I appreciate the unusual type of subject matter that we have here, Your Honors, but the answer to counsel's question, it seems to me, is either "Yes" or "No," or "I don't know." I don't know that it calls for any further exposition.

Mr. McConnell: We will strike that.

Mr. Phelps: I think it would be better if we could proceed a little more tightly on a question and answer basis.

Judge Lemmon: The question was, at a fairly fast rate. Yes or no would not mean very much unless he could explain his answer. You may proceed.

The Witness: We have a problem which is not peculiar only to the Army, but has to do with the nation as a whole and that is the tremendous cost of our defense establishment. From the President to the Secretary of Defense down to all of us, we are constantly cautioned to reduce our costs. One of the primary examples of reducing costs which has come to the attention of the public is the pipeline and the amount of supplies in that pipeline, and with increased speed of modern transport we are able to reduce the very great volume of goods in that pipeline, goods and people, as a matter of fact.

Q. What do you mean by pipeline, General Lasher?

A. By pipeline I mean the amount of goods which have been produced, are unconsumed, and either in storage in the [fol. 477] United States, en route to the consumer, or in storage in consuming points awaiting consumption. Assuming an actual pipeline of oil, it would be the cost of the oil in that pipeline which is unused. It is en route. And we in our attempt to cut that down hope that our whole logistics system is geared to a faster turnover of supplies, thus reducing that pipeline cost. The Navy, the Air Force and the Army are all constantly aware of that, and therefore the answer to your question is we do our best to operate this logistics system as fast as possible.

Q. General Lasher, in the modern situation is it important that you keep manpower as low as possible in the armed services?

A. Well, there again we come into a question of national interest. The United States vis a vis Russia is probably most efficient in the area of manpower. So the answer to the question is "yes," but I would like to go a little further.

Q. Will you explain?

A. After World War I the Treaty of Versailles gave Germany an army of 100,000 men, and Germany had an army of 100,000 men, and every one of those 100,000 men

had a gun on his shoulder. Not one had a pencil in his hand. Now, if you are going to make the most of manpower, we must have the maximum number, so again we are [fol. 478] trying to reduce our administrative manpower requirements to a minimum.

Q. General Lasher, will you briefly explain to the Court the rate making procedures for the transportation of government materiel in this depot system?

Mr. Phelps: Just a moment, General. If I understand the question correctly, it calls for the witness to explain the rate making procedure for the movement of traffic throughout the United States. Once more, Your Honors, at this time I will object to the question unless there is some offer of proof or some representation by counsel that the witness' answer will ultimately be made to appear to be material upon the question of intrastate commerce in California.

Mr. McConnell: If it may please the Court, the very next witness is a traffic manager from Shaw General Depot which is located at Stockton. Now, we feel it is essential to fit that into the general national picture, and that's the only purpose of this.

Judge Lemmon: The objection is overruled.

A. The arrangements and negotiations for the movement of our traffic and the rates thereon is handled by the Office of the Chief of Transportation in Washington, my office. We have a section in our Freight Division which is entitled the Rate Negotiation Section.

Our goods move generally on tariffs, but as we find [fol. 479] penalty class rates applying to our traffic, we ask the carriers involved to sit down and negotiate with us. That is done on a direct basis with the carriers under the provisions of the Section 22 of the Act to regulate interstate commerce. The rate and arrangements finally agreed upon, or finally proffered, I will say, by the carrier or carriers is a rate voluntarily given and a rate which, in most cases, we believe is a rate which that carrier can move the traffic for and still make a profit on his business.

By Mr. McConnell:

Q. General Lasher, you mentioned the class rate. Will you please explain the relationship of the class rate to your problem in arriving at rates for the shipment of government materiel?

A. Well, it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the [fol. 480] goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law.

Now, we find, because of the peculiarities of our traffic and, as I said before, which does not follow the flow of commerce, and many times it is opposite to it, our traffic does not take these commodity rates generally, but the higher class rates.

So it behooves us as traffic managers for the government to avail ourselves of negotiation with the carriers on items which otherwise might take the class rate. We negotiate for the commodity rate level. We negotiate directly with the carriers, as I said, by virtue of Section 22 of the Act to Regulate Interstate Commerce. We are being ex-

empt from the Interstate Commerce Act in that respect, and we do it rapidly, we do it with a minimum of adminis- [fol. 481] trative work, and we find in a very flexible and facile way of handling what otherwise through regulatory agency would be long, drawn out and cumbersome. But it is actually an arrangement by which this traffic of the military is able to get the going commodity rate rather than have applied to it the higher paper rate of the class rate.

Q. General Lasher, in times past, have you arranged for rates in interstate commerce and intrastate commerce in the same way?

A. Would you repeat the question?

Q. Strike the question, please.

In times past have your rate arrangement procedures been the same regardless of whether or not the shipments involved were between points in different States or between geographic points in one State?

A. Yes. However, we have not until very recently had to differentiate in our traffic as to whether it might or might not be intra- or interstate.

Q. You followed the same procedures, I take it, in the past?

A. Yes.

Judge Lemmon: We will take the morning recess.

(Recess.)

[fol. 482] By Mr. McConnell:

Q. General Lasher, could you give a concrete description of how the depot system that you described operates, with special reference to transportation problems that might be involved?

Mr. Phelps: Now, just a moment. If I understand this question, it calls for an example. I would suppose that in view of the fact that this traffic moves in immense volume and in the immense variety that this witness has described, that a single example could be picked up to prove most anything you want to prove.

I think it would be much more appropriate to have testimony as to what is representative of all kinds of traffic.

I object to this witness's answering any question that is calculated to elicit a single example of military traffic in the United States.

Mr. McConnell: May it please the Court, what we are asking for is a representative example, and if I may qualify the question by asking——

Judge Lemmon: With that qualification, the witness may answer.

By the Witness:

A. Our supplies are forwarded to, let us say, overseas areas on a system of requisitions from the requiring agencies to our depot system which I have described in the United States.

The requisition comes in, and regardless of the type of [fol. 483] supplies, the system is similar, but I would like to take a moment to pin it down a little bit.

I would like to take automotive and track and wheeled vehicle parts, an item which is familiar to all of us, and one which, because of the fact that our forces, particularly in Europe, must be very mobile to meet a threat on a very wide front, must be speedily dispatched to the users so that their operations are not delayed.

The requisition comes in, and on the question of spare parts we have a main control center, as we do for all items. The control center on spare parts for wheel and track vehicles happens to be at Rossford Arsenal Ordnance Depot at Toledo, Ohio.

Now, Rossford Arsenal stocks many of these parts, but not all of them. So those which it can fill from its own stock it does; the balance of the items are extracted from the original requisition and placed as a requirement of other such depots, wherever they might happen to have the stocks required.

So that a requisition may be filled from the stock of, say, six depots—five in addition to Rossford, seven in addition to Rossford—and those supplies are shipped, not to Rossford and then out, but from the six or seven depots to a common point—New York, let us say, our Brooklyn Army Terminal—for transshipment overseas.

[fol. 484] So it could well be that some of the stocks could come from other points in Ohio, some of the stocks could come from Texas, some of them could come from Pennsylvania, anywhere in the United States that happened to have them and be near enough so that they would fill the requisition properly.

That, in general, is the system, and it does apply to most all of our supplies, whether it is automotive parts or subsistence or clothing or what.

Now, I would like to make an observation there, if the Court please.

This is a rather intricate arrangement and necessarily so, and one in which timing is important. There is no substitute for a part, for an item, if you don't have it. And I would like to stress the importance of making this system work.

Among other of my duties I was transportation officer of the Eighth Army during the first year in Korea, and we had a lot of truck companies over there, a lot of trucks. The length of Korea was such that we had to use a great deal of transport, and particularly as we raced north to the Yalu River.

Mr. Phelps: Now, just a moment. I dislike to be making these repeated objections, but now here we are about to have this witness telling us about some phase of the Korean [fol. 485] campaign. Now we are getting further and further away from the issue which is involved here, the regulation of intrastate commerce in California.

I object to this witness volunteering in this way to launch into an exposition of the Korean campaign.

Judge Lemmon: Overruled.

The Witness: A. (Continuing) We had many, many trucks, many truck companies and battalions in Korea. The sad part of it was that we had many trucks deadlined, out of commission for lack of parts; and three of the ordinary items which we were in shortest supply, one was spark plugs, one was spring leafs, and one was sealed beam headlights—items which I know were coming off the production in the United States like doughnuts. Spark plugs tumbling off. I could see them. We couldn't get a spark plug. Not

because there weren't spark plugs available, but becaus the logistics system wasn't working for one reason or an other.

Nothing must be placed as an impediment to the complet flexibility and flow of the movement of supplies to our troops in foreign theaters, whether it's in peace or in war

Mr. McConnell: General Lasher, from your experi ence and background and points of observation, what do you think the impact would be on this supply line in the logistical system of the armed services if a state govern ment regulated the rates or the carriage of property for the [fol. 486] armed services intrastate?

Mr. Phelps: Does that complete your question, counsel?

Mr. McConnell: Would you read that question, please?

(Question read.)

Mr. Phelps: I object to the question, if the Court please, on two grounds:

In the first place, it calls for a conclusion and an expres sion of an opinion by this witness upon the very question which this Court is called upon to decide in this proceeding and is therefore objectionable and incompeteht.

Secondly, the witness has not yet been qualified to ex press any opinion as to what the California law is or as to what the pattern of California traffic is upon which that law would operate.

On both of those grounds I object to the question.

Mr. McConnell: If I may be heard a moment, if Your Honors please.

From the very nature of the constitution of the question, here we have something that has never happened before. In a sense you have to pierce the veil of the future and find out what the effect of this general type of regulation will be on something that is in existence and operation now.

What we have tried to do is to get the best people av ail able in the United States and familiar with the operation of the system, and we will qualify General Lasher and [fol. 487] tender him as an expert in military transporta tion matters, solicit his opinion, as it may be.

And when you are dealing in the future, there must al ways be some expression of opinion because no one can

possibly state as a fact what will be something that happens in the future.

Judge Lemmon: Objection is overruled.

The Witness: I would like to hear the question again.

Mr. McConnell: Will you read the question? Well, I think it is a little —— Will you strike the question and may I state it in a little simpler form?

[fol. 488] Q. General Lasher, from your experience and background, what effect do you think the state regulation of the rates for intrastate shipments of government and military materiel would have on the supply lines and the logistical system of the United States?

A. It would seriously impede this entire logistic system of which I speak.

Q. Will you explain——

A. If we were to—if we were forced to go to state regulatory bodies in order to arrange for the movement of our traffic and the rates upon which it moves, we would find ourselves in a time-consuming job of spreading before the public the requirements of the military.

First of all, let me say that it is only until recently that I have had to take into consideration whether certain of our traffic was or was not interstate, and in attempting to prepare myself somewhat, I tried to read some law and I was—I found out that I was terribly confused, that it would be very difficult for me to distinguish in most cases, for we do not know when an item starts out on its journey from the processer whether it is going to be consumed in North Dakota or Florida or Cambodia.

Now, one of our difficulties right away would be for the clerks in our thousands of post camps, stations and bases throughout the United States, our clerks to determine [fol. 489] whether this item was intra or interstate. It apparently is a rather moot question at law, let alone at the administrative level of a clerk earning $3500 or $4000 a year.

Now, then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we

would never fight our way, we would never win the wa
Our negotiations for these arrangements, and I don't sa
just rates, but our negotiations for arrangements for th
movement of traffic must be flexible; they must be direc
with the parties in interest, and they must be as secure a
possible.

We haven't touched on the security yet, but securit
is of primary importance to us.

Q. General Lasher,——

A. (Continuing) Were we to spread——

Q. Excuse me.

A. —spread the record of the characteristics of ou
freight before the public and the parties at interest, w
would seriously jeopardize that security, and in some case
be in violation of the law.

There are many items which move today which are ne
described, some items which are wilfully misdescribed i
order to hide their identity, and they are moving in quantity
[fol. 490] The only people who know what they are ar
about four. The carrier, whether he be a highway carrie
or rail, usually doesn't know what he is carrying; but he ha
been told by one of his officials that that is what he wi
carry and the billing will be such and such and the securit
of that item is thereby maintained.

Were we to have to go through a regulatory body, w
would never be able to accomplish this.

Q. General Lasher, generally would the state regulatio
of rates tend to increase the freight bill of the federa
government?

A. I am sure it would. Getting back to these class an
commodity rates again, the procedure would be so cumber
some and so time-consuming that we would, in desperation
ship on the class rate structure rather than wait for th
procedures to be consummated and thereby increase con
siderably our transportation cost.

Q. About how much does the Defense Department spen
a year now for transportation?

A. About a half billion dollars for the Army, Navy an
Air Force in 1955. That's a peacetime year, rather quie
year.

Q. How much was it in a typical wartime year?

A. Oh, four to five billion dollars, as I remember, somewhere on that order.

[fol. 491] Q. Do you have any idea of just about how much the increase would be if the various states regulated the rates for intra shipment, intra shipment of property?

A. I couldn't answer that question. It would be the degree to which these regulatory bodies would force us into procedures contrary to the best interests of the traffic which moves. If they force us into lengthy procedures, we don't know just where we would end up. So it would be a very difficult—very difficult to hazard a guess.

Q. General Lasher, if the various states regulated the rates for the intra shipment of military materiel, would you have to add on additional personnel?

A. Obviously it would be necessary to increase our force many times, in my opinion. Maybe not 48 times, but we would have to be ready to concurrently handle with several of the state regulatory bodies concurrently at the same time. So that we would have to have a multiplicity of groups, if you will, so that they could be handling concurrently so as not to delay things any more than necessary.

Q. You have mentioned the fact that certain military shipments are secret in nature and that state regulation of rates would jeopardize the element of security for the United States. Can you explain that a little further in detail?

A. If we were making an arrangement or seeking an [fol. 492] arrangement and rate for the movement of an item over which there was a security classification, either one of two things would occur. We either would not be able to tell the Commission the characteristics of that item, and I mean by characteristics what the item is, in what quantity it is going to move, between what points it is going to move. If it was a type security classification, we would be estopped by law from spreading that on the record. But if it were not, we would have to divulge to the public those very characteristics. And if a person were to put together these characteristics, the points between which these important items move and the quantities in which they move, we would be seriously jeopardizing our security. The enemy would find aid and comfort in knowing

just what we were shipping and where we were shippin them and in what quantity we were shipping. Under ou present system we don't have to do that, and it works ou very well.

Q. General Lasher, if the various states put in regula tions of the type here involved, would thought have to b given to either relocating the depot system or redesignin its function?

A. As I stated before, our depots are located in th stream and flow of our particular business, our particula traffic requirements. There would probably have to be a entirely new concept of this system that we are now usin [fol. 493] if we are obliged to go to state regulatory bodie for the arrangements in rates that we now utilize directl with the carrier.

We would probably have to rearrange our entire depo system. That's a rather difficult question to answer, bu there is a good chance that we would.

Judge Lemmon: What are your reasons for that conclu sion?

The Witness: Our depots are now set, upon the presen system, whereby we can with facility make arrangement according to it. If we have 48 different jurisdictions, th pattern of our traffic will necessarily change because o the 48 different ideas as to how our traffic should be—shoul flow, and depending upon the pattern which falls out fro these various jurisdictions, we would then have to adjus our logistics system to comply with the new circumstance rather than the circumstances with which we find ourselve confronted now.

By Mr. McConnell:

Q. Would an effort be made to make more traffic inte state so it would not be subject to state regulation?

A. Probably. I was just trying to think of an example We probably would, to avoid that regulation; we probabl would seek interstate routes when more than one rout was available to us.

[fol. 494] Q. Would it be possible to accomplish a grea many of the missions of the Shaw General Depot, say, fro some other depot?

A. Repeat the question. Would it be ——?

Q. Would it be possible to perform the functions that are now being performed at Shaw General Depot at Stockton from some other depot in the depot system?

A. It would be possible to, yes.

Q. What other depot would——

A. Ogden. Not as well—some of its functions not as well, but it would be possible. That would make for more interstate shipments.

Mr. McConnell: I have no further questions.

Cross examination.

By Mr. Phelps:

Q. General Lasher, you have described, as I recall it, your present title as that of Assistant Chief Transportation Officer for the United States Army; is that correct?

A. Assistant Chief Transportation-Traffic.

Q. Traffic, yes. You have indicated that you're an officer in the Regular Army of the United States?

A. That's right.

[fol. 495] Q. You also indicated that you are a graduate of the Military Academy of West Point. May I inquire the year of your graduation?

A. 1929.

Q. You have been, then, a professional soldier for a large number of your adult years, have you not?

A. That is correct.

Q. You have stated that you have specialized in transportation, I believe you said, since 1936.

A. Approximately that date.

Q. The course of your duties as an officer engaged in specializing in transportation for military traffic, have you ever had occasion to make a study of the movement of government traffic in California between points in California?

A. No.

Q. I take it, then, that you do not presently know of your own knowledge or as a result of any study which you have made or which was made under your direction what is the pattern of government traffic in California?

A. Only in a general way.

Judge Carter: You are now talking about military traffic?
Mr. Phelps: Military traffic, yes.

Q. I take it, then, that you do not know as a result of any such study the types of commodities that move from [fol. 496] point in California to points in California?

A. In a general way.

Q. Well, now, let us see. What would you say, then, generally is the commodity that is moved for the United States Government with the greatest frequency between the points in California?

A. For the United States government?

Q. Yes, military traffic.

A. Military traffic? Probably subsistence.

Q. Yes. In California, then, if you were going to describe the movement of government traffic in California, would it not be important for you to know the percentage that these subsistence items bears to these items which—shall we call military impedimenta, or the items that are peculiar to an army?

A. I do not think so.

Q. Do you know of your own knowledge or as a result of any study that you have made what percentage of the government traffic that moves in California is traffic that begins and ends in California as compared with the percentage that begins or ends outside California?

A. I do not. I would like to qualify that answer. I would like to state, as I stated before, in connection with this question, that it has not been necessary for us to distinguish between intra- and interstate traffic up until a [fol. 497] very relatively short time ago. Therefore we have not had occasion to so distinguish as counsel requests.

Q. Do I understand, General, that you do not have occasion for any purpose to distinguish between interstate traffic and intrastate traffic?

A. No, you misunderstood.

Q. What is the correct answer?

A. You said "ever." Once in a while we do. There would be occasions. But the word "ever" is all inclusive, and the answer to it is no.

Q. Will you describe the occasions or the purposes with respect to which it is important for you to know whether or not the property moves interstate or intrastate?

A. If the occasion demanded us to distinguish between interstate and intrastate traffic, we would so do. In the normal course of our business, however, it has not been necessary and therefore we have not, in the normal course of our operations, distinguished.

Q. In the normal course of business, General, isn't it important for you and the contracting officers who procure this traffic to know whether or not the traffic is moving intrastate or interstate as a matter of practice? Don't you normally want to know that?

A. It would do us little good if we did know it. We never know when an item is procured where it will be consumed.

[fol. 498] Q. You have not answered the question. Do you or do you not normally in practice want to know?

A. We do not.

Q. I show you, General, what appears to be a printed form entitled "Motor Common Carrier Facilities Questionnaire," and as appears in the lower lefthand corner it appears to be a Department of Defense printed form, and in the upper righthand corner it bears the notation, "Budget Bureau No. 22——" —I believe it is—— "F117."

May that be marked for identification as an exhibit?

Judge Lemmon: It may.

(The form referred to was thereupon marked Defendant's Exhibit A for identification.)

By Mr. Phelps:

Q. I will ask you, General Lasher, whether or not you are familiar with that form.

A. I am.

Q. Isn't it a fact that that is a form that is normally, in the usual course of business, required of any motor carrier who expects to do business with the United States Government?

A. It is.

Q. I call your attention to Item 3 D, where the phrase, "Certificate Number" appears and in blocks following,

"ICC" and following that "State." Isn't it a fact that this form contemplates carriers, before obtaining any business from the United States government, indicate for what for the government's purposes what type of operating authority they have?

A. That is correct.

Q. And the government wants to know, does it not, whether or not a carrier is entitled to haul interstate or intrastate?

A. That is correct.

Q. I will ask you to turn the page over, if you will. You need not read it aloud, but I will ask you to refresh your recollection of the requirements that appear on the reverse side of this form that we are talking about. It is a fact, is it not, that this form contemplates and requires that every carrier file with the procuring officer a description of the operating authority which he has received from both the Interstate Commerce Commission and any state regulatory body from whom he has received authority?

A. That is correct.

Q. I call your attention to the black type at the top of the reverse side. I notice there in the fourth line the letters "ATA." That refers to the American Trucking Association, does it not?

A. On the fourth line?

Q. At the top of the page on the back side, where it refers to individual carrier embargo notices.

A. "ATA" refers to American Trucking Association.

[fol. 500] Q. And "DOD" I believe also appears?

A. Department of Defense.

Q. Yes. Now, the requirements for the filing of that form was not an idle act on the part of the United States government, was it?

A. It was not.

Q. It is true, is it not, that you have those forms on file so that when a given move is contemplated between point A and point B that is wholly within one state, you want to know, do you not, whether or not the carrier to whom you award that business is authorized to operate in intrastate, do you not?

A. Not necessarily. As long as he is authorized to operate

between those two points, why, by whatever authority he is authorized to operate, he is able we give him the business, regardless whether it is intrastate or interstate. And I would like to interpose here, if the Court pleases, sir,

Mr. Phelps: Now just a moment, General. I think we are getting along now in this question and answer form.

The Witness: All right.

Mr. Phelps: If there is anything further that needs to be added

The Witness: I would like to explain the form.

Judge Lemmon: You may do so.

[fol. 501] The Witness: May I?

Judge Lemmon: Yes.

The Witness: This form goes to the ability of the carrier to perform the work that we have to do. Now, obviously, if he does not have certificates to operate, he can't carry our business and we won't give it to him.

Item 2 on the front page says, "Type of carrier, inter- or intrastate." Certainly, the state regulates whether he may or may not and under what conditions.

If the state so allows him to operate, we give him business. But we want to have proof.

This goes to the ability and the authority, whether it be inter- or intrastate, the ability and authority of the carrier, not of the goods he carries. I would like to make that distinction.

By Mr. Phelps:

Q. But nonetheless, General, the United States has a concern, has a care for whether or not the carrier has the proper operating authority, does it not?

A. It certainly does.

Q. Yes.

A. But I would like to state that—the first question was to the property carried and the second was to the authority of the carrier. Two very different things.

Q. Well, they are quite different, to be sure, General. But you have indicated that one of the purposes of this form [fol. 502] was to insure that the carrier to whom the business was awarded had operating authority from the appropriate state; is that not correct?

A. That is correct; that is correct.

Q. So that in practice, General, you do not ignore state boundaries, do you?

A. I would like to have that question a little more specific. In what regard do we not ignore state boundaries?

Q. Well, you testified on direct examination that your depot system was so set up, and that your traffic was arranged and that your traffic flowed from place to place without any regard to state boundaries.

A. The flow of our traffic is without regard to state boundaries, yes.

Q. Yes. And you stated, I believe, perhaps I misunderstood you, but I thought you intended to convey the idea that the traffic is arranged for without regard to state boundaries, did you not?

A. That is correct. I believe I said that.

Q. But that's not wholly true, is it, General, in the light of the fact that you are now indicating you are concerned about this matter of operating law?

A. Again, I would like to point out the distinction between the authority of a carrier to operate inter- or intrastate and the nature of the goods which are to be moved. [fol. 503] One goes to the ability and authority of the carrier, the other goes to the characteristics of the commodity moved. Therefore I must qualify that answer.

Q. I should like to read to you, General, a quotation from page 6 of the brief which your counsel has filed in this matter of the motion to dismiss which was heard some time ago.

Quote:

> "In engaging carriers in California to carry its property, the United States, as a matter of policy, is assiduously careful to see to it that none of its property is carried by any carrier which does not completely conform to the regulations of the Commission designed to safeguard the citizens of the state as a whole."

Do you agree that that is the policy of the United States?

A. It is.

Q. Now, you have stated that government traffic does not compete with commercial traffic. I take it that you meant

that it doesn't compete in the sense that the government doesn't sell commodities in the same way that private shippers do.

A. No. I meant compete for transportation capacity, in the same fashion that industrial traffic does. We do not sell, [fol. 504] for we are not in competition with industry that way. But the competition I referred to was the competition for space, not transport capability.

Q. Do you mean to say, General, that the United States government does not compete with commercial shippers for available transportation equipment?

A. Generally our movements are contrary to the general flow of industry. In times of national emergency, of course there is competition for transport capacity.

Q. Well, now, whatever might be the picture nationally, you have indicated that you don't know, with respect to California, how government traffic moves. Now, in the light of that, isn't it true, General, that you don't know either whether or not in California government traffic does compete with local traffic—with commercial traffic?

A. Did you make a statement or did you ask me a question?

Mr. Phelps: Would you read the question?

(Question read.)

A. I would say in general the same statement as to the national picture would probably apply in California.

Q. But that is a surmise on your part, isn't it?

A. That is correct.

Q. Now, you have stated also that one of the policies of the Department of Defense was to use commercial type transportation, and that it was desired to maintain a [fol. 505] broad base of transportation and a strong fleet, I believe you said in substance.

Would you agree, General, that where you have cut-throat competition going on between two or more carriers of the same type of carrier, and competition going on between rail v. motor traffic, that that presents a threat to the economic stability of the carrier industry?

A. Cut-throat competition would be a threat, yes.

Q. And is it not undesirable, General, in the light of this

policy to maintain a strong fleet, is it not undesirable in your opinion to permit the continuance of practices whereby carriers do beat down the rates for the transportation of government traffic to the point where they become a burden on other traffic and to the point where they drive themselves into bankruptcy? Isn't that undesirable?

A. Yes, it is undesirable.

Q. Are you familiar with the proceedings that took place before the California Public Utilities Commission commencing in the summer of 1954, a petition that was filed with the Commission by a group of motor trucking carriers who were performing a substantial portion of transportation for the Department of Defense?

A. I am not.

Q. Have you any knowledge at all of any proceeding before the California Commission involving this question of [fol. 506] rates for government traffic?

A. A smattering only.

Q. Only a smattering? I take it, then, that before coming here to testify you didn't find it was necessary or desirable for you to inform yourself as to what the local picture in California was?

A. That's correct.

Judge Lemmon: This may be a convenient place to break for the noon recess?

Mr. Phelps: Yes, Your Honor, it would be.

Judge Lemmon: The three judges would like to know if you could enlighten us as to how much time you think the taking of evidence in the case would consume.

Mr. Phelps: Speaking for the defendant, Your Honor, we have five witnesses, and I estimate about a day or a day and a half to put on the defendant's direct.

Mr. McConnell: May it please the Court, we have twelve witnesses, and we want to make a full presentation. I think it will take us at least two days, at the rate of cross examination, and probably two days and a quarter.

Judge Lemmon: Thank you.

The recess will be until 2:00 o'clock, if that is agreeable.

(Whereupon an adjournment was taken to 2:00 o'clock p. m.)

[fol. 507] Afternoon Session, Monday, March 19, 1956 at 2:00 P. M.

Edmond C. R. Lasher, resumed the stand.

Cross-examination (Cont'd).

Judge Lehmann: You may proceed.

By Mr. Phelps:

Q. General Lasher, in the course of your direct examination you stated that military traffic at present under present practices moves generally on tariffs. You recall that statement of yours?

A. Not specifically, no. I may have made it.

Q. Well, that is the fact, is it not, that most of the movements of military traffic are movements for which the rates are determined in accordance with an established tariff, isn't that true, in terms of numbers of shipments?

A. Probably, yes.

Q. Now, those tariffs which I have in mind, and I assume you have in mind for purposes of that question, are tariffs establishing rates for all shippers; is that the type of tariff you had in mind?

A. Do you mean class rate tariffs, or do you mean under class rates or commodity tariffs?

Q. Let's back up a little bit. As I understood your direct testimony you said the traffic moves generally on tariffs, but that from time to time when you discovered that those tariffs produced, I think you said the word "penalties," you [fol. 508] sought commodity rates?

A. Yes.

Q. You recall the substance of that?

A. Yes.

Q. Now, I think you did use the word tariffs in that context. Now, I will ask you to tell us what you meant by the word "tariffs" as you used it there.

A. Well, if there are rates in the tariff which cover the movement of our goods and that tariff rate is fair and reasonable, we use it, we do not seek any change in that rate.

Q. Yes. Now, the tariff that you are talking about there is a tariff that governs the rates for shipments for the public generally; is that the type of tariff you are talking about?

A. That's right.

Q. Including the United States Government as a shipper, is that right?

A. That's right.

Q. And those tariffs are very considerable in number, are they not?

A. Correct.

Q. You have tariffs reflecting interstate rates, do you not?

A. We do.

Q. And you have tariffs reflecting intrastate rates, do you not?

[fol. 509] A. We do.

Q. For all 48 states of the Union, do you not?

A. That's right.

Q. The rates for interstate traffic are rates that are established by the Interstate Commerce Commission; that is correct, is it not?

A. That's correct.

Q. And the rates for intrastate traffic are the rates established by the 48 states; that is true, isn't it?

A. That's correct.

Q. Now then, it is true, is it not, General, that for purposes of determining the rate for many shipments of government property it is necessary to have available and to be familiar with a multiplicity of various tariffs, isn't that true?

A. That's correct.

Q. And it is not true that those persons in the United States Government and in the armed services whose duty requires that they determine these rates, they must be skilled in the use of tariffs, must they not?

A. They must.

Q. That is at the present time and under present practices, isn't it?

A. That's correct.

Q. Can you give us some idea of the number of interstate [fol. 510] and intrastate tariffs that your transportation officers must be familiar with?

A. I cannot. There are many of them, however.

Q. It would be at least 48 plus one, wouldn't it?

A. Oh, yes.

Q. 48 states, plus the Interstate Commerce Commission. And isn't it true that you have in each of your states numerous tariffs filed by various tariff publishing agents?

A. That's correct.

Q. Would you say then that the number of tariffs applicable to shipments of the public generally runs into the hundreds?

A. I would.

Q. Now, in addition to those regularly filed tariffs applicable to shipments by any person, for purposes of arranging transportation and rating the shipments for the Government you have the so-called Section 22 quotations, do you not?

A. We do.

Q. And they run into the thousands, do they not?

A. They do.

Q. And the persons charged with the responsibility of fixing your rates, of determining or ascertaining the applicable rates, these men must be familiar not only with the regularly filed tariffs applicable to commercial traffic, but with these thousands of special rate quotations, don't they?

A. That's correct.

[fol. 511] Q. In order to give the Government the most advantageous rate for a government shipment; that's right, isn't it?

A. Correct.

Q. Now, in the light of those circumstances, is it still your opinion that you, under your present practices, can procure transportation for government, for military traffic and determine the correct rate rapidly and with a minimum of administrative work?

A. Can we now, you mean?

Q. Yes.

A. With a minimum of work under the circumstances. In some cases it is a very technical procedure and is somewhat time-consuming to check out a new rate. Under the circumstances involved in checking out a rate, however, we do it in as minimum a time as possible, as rapidly as we can.

[fol. 512] Q. But the very existence of these multitudes tariffs and tariff publications in itself present a vo formidable problem, does it not?

A. It does. I would like to qualify that answer, howeve As far as the number of rates are concerned in the tari yet as the number of rates which you expressed as being the thousands, there are far more rates in the tariffs th there are in Section 22. You said 48 plus 1. That is tr But there are many, many times that, of course, so-t number of rates involved in tariffs, state and interst tariffs, are far greater than the number of rates involv in these Section 22 quotations.

Q. Let me ask you, General, this question. Do you ha certain standardized procedures prescribed by the Secreta of Defense for the procurement of transportation?

A. Not in any great detail, no, sir. That is left pret well to the military branches under general policy guidan from the Secretary of Defense.

Q. There are certain regulations, however, which ha been promulgated by the Secretary, isn't that true?

A. By the Secretary of Defense?

Q. Yes.

A. That is correct.

Q. And those regulations are amended from time to tim

A. They are called directives and they are revised fro [fol. 513] time to time, that is correct, and as the directiv are issued as policy directives by the Secretary of Defens they are sent to the three Secretaries of the Army, Nav and Air Force, and those secretaries are directed to pr mulgate them to the field of the three services, to the opera ing agencies.

Q. I take it you are familiar with those regulations pr mulgated by the Secretary?

A. I am.

Q. Is it correct that all those who are charged with th responsibility of procuring and arranging for transporta tion for government traffic are likewise supposed to b familiar with those regulations?

A. Yes, that is correct.

Q. Is there any sort of manual of instructions for you local procuring officers?

A. In the Army we have a set of army regulations, pa

of which, sections of which are written for the guidance and direction of the people in the field. That is how we promulgate the general directive of the Secretary of Defense to army regulations.

Q. And are there corresponding manuals or sets of instructions for the Navy and the Air Force?

A. There are.

Q. What does this manual of instruction for the Army [fol. 514] look like?

A. Well, it is divided into many sections to cover the entire responsibility of the Department of the Army and they are called army regulations. It is a looseleaf affair with each section having its own subject and being complete in and of itself. There are several of these sections given over to the procurement of commercial transportation.

Q. Would it be possible for us to obtain a copy of those for the purpose of this proceeding?

A. It would be possible, yes.

Mr. Phelps: Counsel, could you undertake to supply us with a copy of those?

Mr. McConnell: We will.

Mr. Phelps: And likewise those governing the navy and the Air Force.

Q. Now, I am going to ask you, General, if you will, to describe the procedure that takes place, in detail if you will, the chain of events that takes place from the time a move is planned until the time when the carrier is paid off. I take it that the first step after the commander or whoever is in charge makes his decision, is a requisition for certain materiel, is that right?

A. That depends upon the type of movement that you wish me to talk about. Some movements, some requisitioning cycles are automatic; some are not. Some movements [fol. 515] are in connection with troops; some are not. There are a large variety of movements, and necessarily so. Some go to maneuvers and back, one time moves. Others are continuing. There are various kinds. I would be glad to describe all of them if you wish.

Q. Perhaps we can simplify it, General. Is it fair to say that your moves fall into certain categories, each of which

has certain characteristics? Let me suggest certain categories and you tell me whether or not these are fairly accurate. Is it true you have a certain category of movement in smaller volume, shall I say, less than truckload or less than carload, and with respect to which you have a substantial advance notice of the move? You have that category of movement, have you not?

A. Possibly. It is very hard to pin down. We have to some of our smaller installations, less than truckload moves on a regular basis probably, yes, but not always do they move in less than truckload quantities. I might add that.

Q. No, but from time to time you do have moves that are less than truckload or less than carload and with respect to which you have a matter of some days' advance notice as to when the movement is requirement, is that true?

A. Yes. You are not pointing to a continuing move. From time to time.

[fol. 516] Q. From time to time.

A. We do have such movements.

Q. Yes; all right. You also have; have you not, from time to time moves that occur in large volume, truckloads, carloads, multiple truckload, multiple carload?

A. We do.

Q. Sometimes those moves occur on very short notice, do they not, a matter of hours?

A. Sometimes.

Q. Sometimes you have a matter of days, weeks or months of notice for those moves?

A. Seldom months.

Q. Weeks, shall we say. And then you handle, I suppose, from time to time a small volume on short notice?

A. Yes. Well, I think we have covered it all. We have all types of moves—small quantity, regular flow, large quantity, regular flow, long notice, short notice—I mean, the gamut.

Q. Let us suppose you have those working categories of traffic established. Isn't it true, General, that with respect to your less than truckload, what I will call L.T.L. long notice move, that is the type of traffic that you move under your regularly filed tariffs, isn't that true?

A. It could be.

Q. Do you have any opinion as to whether or not that is [fol. 517] your usual practice?

A. Probably we would move that L.T.L. load by other means than L.T.L. movement. We probably could get some sort of forwarder arrangement whereby we would not be forced to pay quite the class rate on the item.

Q. But you would take your rate out of a regularly filed tariff of a freight forwarder?

A. Possibly. We attempt on those small shipments to consolidate them as much as possible and thereby save transportation costs.

Q. Yes. But the point I am trying to establish is that you do get your rate out of a regularly filed tariff, do you not?

A. We might or we might not.

Q. Isn't that a large quantity of traffic such as that, in general,—small quantity, less than truckload, I mean to say—where you have plenty of time to plan the move? Don't you have a large quantity of such traffic as that?

A. Well, first of all, I would have to ask you what you mean by "large." It is a rather relative term and it is pretty hard to say what is large.

Q. Let me put it this way: In terms of number of shipments, don't you have many more of that type of shipment than of the large volume move? I am thinking of numbers of shipments, not tonnagewise, but numbers of shipments.

[fol. 518] A. Not necessarily. If you are taking line items, yes.

Q. Taking what?

A. Line items—one spark plug versus one 250 millimeter shell. Line items, yes. The answer to your question would be yes. But tonnagewise, no.

Q. I said tonnagewise, no. I did not mean to indicate that they were greater tonnagewise, but in terms of numbers of shipments you have more of that small quantity, long notice move, than the large quantity; have you not?

A. If you leave out the long notice move, the answer is yes. You are pinning me down here now. I find it difficult to answer the question without recourse to records. But I would say that because the small quantity item, the minor items, of which we have so many, that line itemwise, they

far exceed the heavier items, such as tanks, of course. And the numbers of the shipments. Because the spark plug wears out faster than the tank. But whether they are all short notice or long notice is hard to say. Of course, many of these consumables are on an automatic issue basis, and therefore would not come in necessarily to the requisitioning cycle. Do I make myself clear?

Q. Yes, I believe I understand that. Let us take another category of movement, the large quantity truckload or multiple truckload, and again where you have ample time, shall we say weeks within which to prepare for the move. [fol. 519] That is the type of move with respect to which you would like to get special rates, isn't it, General?

[fol. 520] A. Yes. We use all information we possibly can get from procurement on through the movements of the items so that we may plan our transportation, yes.

Q. And isn't it true that for small quantities, less truckload moves, your local contracting or procuring officer is authorized to route those shipments without further authority, isn't that true?

A. Under—yes, that's true.

Q. And you route them from these tariffs that we have been talking about, don't you?

A. Yes.

Q. And rate them from those tariffs, isn't that right?

A. Well, yes.

Q. Now, let's suppose, General, that we have a large quantity move with respect to which you have, say, two weeks' advance notice. Now, would you describe the procedure that takes place—your usual procedure?

A. All right. The shipping installation, Depot A, has ten carloads shipments to move to B. Inasmuch as our regulations are such that it requires routing by one of our regional offices, the shipping officer would go to the region concerned and ask for routing instructions.

Q. Just a moment there. You say the regional office concerned. Would you tell us a little more fully what that is?

A. For the purposes of routings and rates, information [fol. 521] and other traffic work, the Army has divided the United States into four zones or four regions. We call them zones.

The headquarters of our first zone is at Pittsburgh, Pennsylvania; the headquarters of our second zone is at Memphis, Tennessee; the headquarters of our third zone is St. Louis, Missouri; and the headquarters of our forth zone is in Salt Lake City, Utah.

The area generally is the northeastern part of the United States for the first zone, the southeastern part of the United States and part of the southwest for the second zone, middle west for the third zone, and far west for the fourth zone.

So if he was located in South Dakota, he would go to St. Louis, our third zone, and request routing instructions, get the pertinent data as to the shipment, its origin, destination, the time in which it had to arrive at destination, and the consists of the shipment.

The rate experts at St. Louis would immediately check that shipment through and route it, sending the routing instructions back to the shipping officer.

He in turn then draws a bill of lading covering that shipment according to the routing instructions that he received from St. Louis, and would ship it as it became available.

Q. And the bill of lading, when it is finally drawn, or cut, I think the word is, the carrier is given a copy and the [fol. 522] original is forwarded to the consignee, isn't that the usual practice?

A. Well, that's part of it, yes.

Q. And at the end of the transportation process the carrier, when he makes delivery, either picks up or obtains the original bill of lading, doesn't he, when he makes delivery?

A. And gets the signature on it.

Q. Yes.

A. From the consignee.

Q. Yes. And that bill of lading; what happens to that bill of lading then?

A. The original——

Q. Yes.

A. —is signed by the consignee for the receipt of the goods.

Q. Yes?

A. That accompanies the carrier's bill when he submits

his statement to the Government for his payment of his services.

Q. Yes. Now, to whom is that statement submitted?

A. That statement is submitted to—I am not sure. I can't answer that question.

Mr. McConnell: Mr. Phelps, I don't want to interrupt you, but we are going to have a great many witnesses here who are absolutely operating on this level, so that maybe your cross-examination will be more fruitful from later [fol. 523] witnesses rather than General Lasher, whose present position is so much at the top side.

The Witness: (Continued).

A. We do have various finance offices who do pay these bills, and it would depend on where this carrier was as to who his paying finance officer would be. He would submit it to a finance officer of the United States Army.

By Mr. Phelps:

Q. I see.

A. We have a central such office in Indianapolis, I believe, where those are collected, but I don't think they pay. I am not sure.

Q. And it's true, is it not, that after that original bill of lading has been forwarded by the carrier to this appropriate finance officer, that there the shipping data is once more examined by government personnel in order to determine what is the proper rate?

A. It is not.

Q. It is not done? They pay on the carrier's rating, do they?

A. They do.

Q. Then I take it that in practice the carrier shows on this original bill of lading which he forwards, his calculation of the rate as he understands it, is that the usual practice?

A. That is correct.

[fol. 524] Q. And the Government pays on that?

A. It does.

Q. All right. Now, is it understood that we have been talking about a large volume move?

A. Well, I said ten carloads.

Q. Yes. This is not the LTL kind of shipment that you have been describing, the seeking of authority, of routing authority for LTL's you don't have to do that, do you?

A. No, we do not.

Q. All right. So we are talking about the quantity move, aren't we, for which the local procuring officer seeks the routing from the original office, right?

You nod your head. You mean yes?

A. Yes. Sorry.

Q. Now, in this regional office, that's where they have this, shall I say, library of these thousands of tariffs and special quotations, don't they?

A. Yes.

Q. And that's where they have a staff of skilled rate men working, isn't it?

A. Yes, sir.

Q. Now, how long does it take—I am speaking now of this move of multiple truckloads for which we have two weeks' notice. How long does it take your local procuring officer to get your routing from your regional office?

[fol. 525] A. It varies from a matter of an hour to a matter of a day, perhaps, maybe two days, depending upon—of course, if it is an item which normally moves between the two points involved, the rate is there and available and being constantly checked out. But if it is an entirely new move, it has to be checked out as an original and therefore takes more time.

Q. I see. Well now, let's go back a little bit.

As I understand it, for some of these large volume moves your tariff man in the original office will discover that some carrier or group of carriers has previously filed some rate quotation that will cover that type of move? That happens from time to time, doesn't it?

A. That's right.

Q. In that event it is a comparatively simple matter for them to notify the local procuring officer how to route the shipment, isn't it?

A. That's right.

Q. Now, from time to time you say you have a move involved for which there is not already on file a special quotation or tariff which the regional officer considers as suitable. Now, in that event you take the matter up with the carriers and seek to negotiate a rate, do you not?

A. If we feel that negotiation is in order. If we feel that it will be to the best interests of all concerned, we do take it up with the carriers.

[fol. 526] Q. And I take it that from time to time you have these large volume moves with no previous quotation, but with plenty of notice, with respect to which you have a matter of days during which you can't negotiate a rate, isn't that true?

A. There are such cases, yes.

Q. Yes. Now, I take it that once in a while you have a move with respect to which, a large volume, no rate quotation is on file and it must move on short notice.

A. We do have such.

Q. Yes. Now, tell us what you do.

A. We ship it.

Q. You move the traffic first and negotiate the rate afterwards, don't you?

A. That's right.

Q. All right. Now, you have testified that in your opinion, General, this law of the State of California which empowers the California Public Utilities Commission, gives a certain jurisdiction over rates, would impede the flow of military traffic. Now, first of all, I will ask you what is your understanding of the state law that you say will impede the traffic.

A. Well, going back to the previous question, my answer was that we would ship the cargo if it had to move. It's my understanding that if there was a question of negotiation [fol. 527] under most statutes the rate negotiated would not be retroactive. It is my impression of the present statute in California that that would also be the case in California. Therefore, we shipped the traffic, it had to move, there is no question about that, no question in anybody's mind that we had to get it out, had to get it going. Sure, a week, two weeks later we would come to negotiate for a reasonable rate. But in the meantime, a hundred truck

loads, 150 carloads of that item might have moved, and a month later we negotiate a satisfactory, reasonable rate on that traffic, but it may all have moved, or substantial portion of it may have moved on which the rate would not be retroactive.

That is my impression. Now, I may be wrong.

Q. I am going to ask you, General, what is your full understanding of all of the elements that enter into the present amended California law, which is the subject of this proceeding? Tell us your understanding of what that law does.

Mr. McConnell: I don't wish to in any way interrupt any line of inquiry, but it seems rather an unfair thing to ask an opinion of a general in the army with respect to what a statute absolutely provides. If he could give it in a rough way, but I take it that the only thing that's in issue here provides the Commission shall approve the rates of government shipment.

[fol. 528] Mr. Phelps: Just a moment, counsel.

Judge Lemmon: The witness gave testimony as to the result of having to go to the Utility Commission. It seems to me it is proper to inquire into these matters that go into that very question. You may answer.

A. My impression is that the statute as now written gives to the Public Utilities Commission, to the State, the authority to regulate. My understanding of the regulation of traffic goes to the first—first to the authority to operate. Secondly, it goes to the authority, to the making arrangements for the movements, and thirdly, it goes to the authority for the establishment of a level of rates. The effect upon us of that law means that—

By Mr. Phelps:

Q. Just a moment, General. Before you go to the effect, I want you to tell me when you have described the whole of your understanding as to what the law is.

A. You want me what, sir?

Q. Have you completed your answer?

A. Yes.

Q. As to what your understanding of the law is?

A. Yes.

Q. That it empowers the Commission to regulate the rates and the operating authority?

A. Right.

[fol. 529] Q. And have you read that statute lately?

A. Not lately.

Q. Have you ever read it, General?

A. Yes, I have read it.

Q. How long ago did you read it?

A. I don't recall.

Q. Do you know when it was enacted?

A. Recently; fairly recently. I don't know the date, no.

Q. Are you aware of the fact that this law that is under attack in this proceeding empowers the Commission to permit carriers to transport property for the United States government on whatever terms and conditions the Commission may find reasonable?

A. Yes.

Q. You remember that now, but you didn't recall it before?

A. That is the regulation by the Commission, the power the law gives to the Commission to regulate, is it not?

Q. I want you to tell me, General.

A. That is my impression of what it means, as I stated before. It gives the power to the Commission to regulate, and therefore, as you read it, — I can't give it in those exact words — as you read it, it means to me the same thing.

Q. I will ask you to read the last paragraph of Section 530 of the California Public Utilities Code.

[fol. 530] Judge Carter: I have a copy in an exhibit here.

Judge Hamlin: Page 2.

Mr. Phelps: I have now the official steering code, Your Honors.

Q. Referring now to the statutes, Section 530 as amended, I will ask you to read to yourself — you needn't read it aloud — the last paragraph of that statute.

A. (Witness reading)

By Mr. Phelps:

Q. Now, would you conclude from reading that statute, General, that the Commission of the State of California under this law is empowered to authorize carriers to transport property for the United States government at free or reduced rates?

A. Is empowered to what?

Q. Transport property for the United States at free or reduced rates upon such terms and conditions as the Commission finds reasonable.

A. On such terms and conditions as the Public Utilities Commission of California deems reasonable.

Q. Yes. That is your understanding.

A. That power flows from this statute to the Commission to regulate, that is my impression of this statute.

Q. Yes. Now, have you any reason to suppose that the Public Utilities Commission of the State of California would not be receptive——

[fol. 531] A. I have not.

Q. Let me finish my question. ——would not be receptive to representations by either carriers or by representatives of the United States government or by both of them, representations that certain types of traffic of the United States government should move at something less than the rates appearing in the established tariffs for other kinds of shipments?

A. I would like to have the question repeated.

Mr. Phelps: Would you read the question, please?

(Record read.)

A. I have not. I feel the Public Utilities Commission of the State of California or any other state commission, for that matter, would be most receptive to any representations we of the military might have before such hearings.

Q. Then I take it,——

A. (Interrupting) But the——

Q. Excuse me.

A. But the mere fact that we would have to make such representations is to me the crux of this. Again I go back to my original testimony, wherein I stated that the mere

fact that we would have to spread the record with things which we might not want to spread the record with is inimical to our best interests. Certainly I can not say what the Public Utilities Commission of the State of California [fol. 532] under this statute will do at some future date or will not do, nor any other state commission. All we can go on, however, is what these regulatory bodies do do in such circumstances; how do they conduct themselves and how do they get at the meat of the matter before them. We know what has been done in the past and that is what we want to avoid in the future.

Mr. Phelps: I have distributed to Your Honors a pamphlet which is the advance sheets of the decisions of the Public Utilities Commission of the State of California. They will ultimately be printed in the form in which they appear here. These are decisions of which I believe Your Honors can take judicial notice.

Q. I should like to call your attention, General, to page 513 of this little pamphlet. You, of course, have not had an opportunity to examine this at your leisure, but I think a glance at it will show that that decision is a decision upon a petition of one J. P. Haynes, who is the tariff publishing agent, publishing tariffs on behalf of the Atchison, Topeka & Santa Fe Railway Company and the Union Pacific Railway Company; I think it will appear from this decision that that's an application by Mr. Haynes for authority from the Commission to deviate from his regularly filed tariffs for the handling of certain kinds of shipments for the United States Marine Corps in and near Barstow, California.

[fol. 533] Mr. McConnell: May it please the Court, if I may, I am a little bit troubled about this being part of the record. We have to think in terms of sooner or later printing this record. I do not know the particular relevancy of this examination or where this particular subject leads at the moment. May I suggest, since the Court is sitting in equity, that it reserve a motion to strike with respect to this detailed and more or less voluminous testimony so that in the end, in the event the bearing of it on the issue appear as somewhat remote, we might keep our record in controllable size.

Judge Lemmon: You may move to strike at a later time.

Mr. Phelps: If it please Your Honors, I do not think it is necessary to print this. This is a matter of which the Court can take judicial notice. I do not see any necessity of printing it.

Mr. McConnell: I do not want to get into a discussion of the technical rules of law, but the question of whether or not the decisions of the Public Utilities Commission can receive judicial notice in the Federal Court is a question of serious doubt. But I do not want to cramp your style, counsel. I would just rather reserve a motion to strike.

Judge Lemmon: You may reserve that right.

Mr. Phelps: I think I can summarize this briefly and fairly, General:

[fol. 534] Q. It is a petition of the type I have described. The Commission granted the authority requested, and I shall invite your attention to page 514, the second paragraph, the second sentence, where it states by the Commission:

> "This is a matter in which a public hearing is not necessary,"

and where at the bottom of the page it says:

> "This order shall become effective on the date hereof."

I should like to call your attention likewise to the date of the decision, which is November 29th, 1955, which is some days prior to the commencement of this proceeding.

General, if that decision to which I have referred can be taken as an example of what the Commission has already done prior to this proceeding, does that tend to allay your anxiety as to what this Commission might do in handling these requests for special rate treatment of the United States Government?

A. Before I answer that question I would like to get something clear in my mind. The date of this is November 1955. Was the revised statute in effect at that time?

Q. Yes.

A. It was. Was it in effect, this revised statute——

Q. It was partially in effect and part not in effect, as a result of this court restraining order.

[fol. 535] A. Was there not a restraining order to its effectiveness? I ask the question simply for this reason. For years there has been on the statute books of California a section which has been comparable to Section 22 of the Act to regulate interstate commerce. That has now been stricken from the statute books and a new paragraph substituted therefor, which empowers the Public Utilities Commission to do certain things. What it will do in the future is not for me to say.

However, the trend certainly indicates some intent on the part of the Legislature of the State to control. However magnanimous the Commission itself might be, or at any one time, depending upon its makeup, or however uncompromising it may be, depending upon some other makeup, what we view with alarm is an obvious intent to further regulate our logistic system by regulating the traffic which moves for it.

Q. You view it with alarm, General, do you?

A. Yes, I do.

Q. But you have no reason to think that the Commission will not act reasonably, have you?

A. None whatsoever.

Q. We have described a type of movement with respect to which it is a large volume and must move before a rate can be negotiated, and with respect to which your present practice involves a negotiation of a rate after the movement has been consummated, a rate which becomes effective [fol. 536] retroactively to the move, is that right? This is one of your types of movement, isn't it?

A. Yes.

Q. Having in mind the powers of the Commission conferred by the statute which I have just read, would your alarm and your anxiety be allayed with respect to that type of movement if the Commission upon proper representations should approve a rate arranged between the carrier and the Government after the movement took place and authorized the carrier to make it effective retroactively?

A. I would like to have the last part of that question read.

(Question read.)

A. Partially—not wholly, because the power would still flow to the Commission. The power would still flow to the Commission, in my opinion, and therefore still be a threat.

Mr. McConnell: May it please Your Honors, I do not wish to interrupt any line of inquiry that would throw light on the issue, but I question seriously, and I would like to put this under a reserved motion to strike, the relevancy or bearing of this particular line of inquiry. As I understand, we are here dealing with a constitutional issue which had its genesis in McCulloch versus Maryland, which is one of the primary landmarks in constitutional law. As every first year law student or second year law student learns when he takes constitutional law, the power to tax [fol. 537] is the power to destroy. That, of course, has been limited in the particular doctrines of taxation.

But when you are thinking about power, you have to think about the exercise of the power in the constitutional sense. We submit that the Commission will be reasonable and all of that, but the existence of the power focuses and highlights the question as far as the constitutional principles are concerned. We can't tell where it leads. We cannot ask the General to pierce the future for, like the Aspostle Paul, he sees dimly through a dark glass what the Commission is going to do.

Judge Lemmon: The witness in answers to questions you propounded expressed an opinion and I think it is quite within the right of opposing counsel to inquire into the basis of the opinion.

Mr. McConnell: I understand that. I just thought it might be getting a little too legal for an army officer in connection with the detail and the technical interpretation of the statute. I just doubted the value of it.

Mr. Phelps: I shall leave that to the Court to decide.

So much for the volume move on short notice, which presents a certain unusual type of problem.

Q. Now, for the volume movement when you have long notice, your present practice contemplates that your local officer get instructions from your regional office, doesn't [fol. 538] it; your present practice contemplates that your regional office must research the tariffs and the special

rate quotation, doesn't it, and then notify the local procurement officer?

With respect to that type of movement is it still your opinion the state statute would adversely affect that type of movement?

A. It depends on how long a period is involved, how long it takes to go through the regulatory processes. It could well, even with relatively long notice, affect us. However, it could well be done within that time, too. It is hard to say.

Q. Let us assume this kind of case, and I will ask you whether or not that does not obtain. Let us assume that some carrier or group of carriers have participated in a special rate quotation which has been filed, shall we say, six months in advance of this proposed move, and that quotation is on file with your regional office. The rate, however, has been negotiated, if it was the result of negotiation, or it has been quoted, if it was simply a voluntary quotation by the carrier, by hypothesis, let us say now, six months in advance of the move: How would it be any more difficult or any more burdensome for the carrier some period in advance of a month to decide what rate he is willing to quote or authorize his agents to quote it for him and then to obtain the approval of the Commission before filing it with the Government? How does that impose any [fol. 539] extra burden?

A. It may not, but again under the statute, as I understand it, my impression of it, which you asked me to give you, the power is in the Commission. The power is in the Commission. How the Commission will act or what it would do under a certain set of circumstances I do not know. But we know what regulatory bodies do require in *such* instances, and while a particular set of circumstances might be open and shut, another set of circumstances might force the Commission into a lengthy hearing, in which case we would be. I can answer that question only in that fashion. [fol. 540] Q. Well, now, if I understand your question correctly, the only extra burden or the only extra hardship involved in the type of traffic that I have asked you to assume, involved in getting previous authorization from the Commissions is this vague anxiety of yours as to whether

the Commission will act reasonably; isn't that what you are saying?

A. I can't say whether a particular commission would act reasonably or not. I know that in times past when we have had to go before commissions on rate matters or other matters that it has been considerable impedance to our work to have to do so.

I can only infer that commissions, other commissions if such there be, with jurisdiction over our transportation, we would similarly have to go through similar procedures. That they will be reasonable, there is no doubt in my mind. But circumstances vary and under certain circumstances we are very likely to be impeded.

Q. Is it your understanding that the present California law requires that the United States government, through its agents, appear before the Commission and negotiate these special rates?

A. I haven't read that it requires it. However, as it may deem reasonable, to the Commission it may be reasonable to require testimony from the federal authorities, in which case we would have to appear, if that would appear reason [fol. 541] able to the Commission.

Q. But the statute doesn't require it, does it?

A. I haven't read it in the statute, no, sir.

Q. Now, with reference to the small volume, less truck load, traffic where you have ample notice, that moves presently just like it would under the amended law where it does, say, move under established tariffs, doesn't it?

A. Which one, now?

Q. Less truckload, long notice shipment.

A. Probably does.

Q. So the statute would have no effect on that type of move, would it?

A. Generally, no.

Q. Now, can you tell me, now that we have these working categories of movements that we have talked about, can you tell me from your knowledge of the government traffic, what percentage—I am thinking now in terms of tonnage—what percentage of your traffic falls into this "large-volume, short notice" category. By "short notice" I mean so short that you have got to move your traffic

out and negotiate the rate afterwards. What would the percentage of that kind of traffic be with relation to the whole volume of United States government traffic?

A. I can't answer your question.

Q. Isn't it very, very small, General?

[fol. 542] A. I can't answer your question. This categorization of our traffic as you have put it forth is not a categorization that we normally have, and therefore a comparison of tonnages within categories I am not familiar with. I can not answer your question; I am sorry.

Q. Well, would you say this much, that that type of movement, large quantity, short notice, is the unusual type of move?

A. No, I would not. It could well be the usual type of move. Particularly in time of national emergency.

I cite our lend lease program in World War II. I cite our M.D.A.P. program presently. We don't know what Cambodia is going to need tomorrow. We don't know what Pakistan may want. It's all a matter of conjecture.

It may be that large volume, short notice or small volume, short notice, sporadic.

Q. Well, I take it that you don't presently know from an examination of any figures what those percentages are.

A. No, because you have arbitrarily placed them in categories which I haven't.

Q. I understand.

A. Nor our organization.

Q. Now, there is one more category which I would like to refer to since you did, and that's this category of moves that involves security.

[fol. 543] Now, you have indicated that it would be burdensome and dangerous to national security if that sort of move was subject to state regulation.

Isn't it true that you have a very small number, both in terms of numbers of moves and tonnage of that kind of moves?

A. No; it is not true.

Q. All right. Let me suggest this: You have indicated that one way of coping with this problem of security was to misdescribe the commodity, did you not?

A. I did.

Q. You indicated that that's at present the practice.

A. That's right.

Q. Now, would you tell me how the state law of California would impose any extra impediment upon that practice?

A. We would not be able to handle directly with the carriers. We would have to explain.

You see,—again let us go back to security. Security is based upon a "need to know" proposition. The more people who know a secret, the less of a secret a certain matter is. So we disseminate critical information on a "need to know" basis.

It may be necessary for me to know something in my business, but my immediate superior need not know. Therefore, my immediate superior does not know. We hold the [fol. 544] information. We withhold the information from as many people as possible, narrowing it down to the bare minimum who need to know in order to do the particular mission involved. And so that is a Department of Defense and a military precept.

So it is in our traffic. We want to handle these security moves with the individual, if possible, who alone can say to his company, "Move it," and his company, his president or vice presidents need not know, nor his drivers need not know. He says, "Move it," so it moves. He is the only one that knows anything about it, its characteristics, where it's moving, in what quantity it is going to move. We have kept it on a "need to know" basis. That is the core and sum and substance of security.

And so, as we move into regulatory bodies, and we have to bring in a commission, we have to bring in all of the other appurtenances which belong to a public hearing, we have not kept security on the "need to know" basis. And therefore I say it is inimical to our best interests.

Q. Have you finished your answer?

A. Yes, sir.

Q. Now I will ask you to answer my question: How would California regulation present any extra burden upon this present practice of misdescribing your commodity?

A. I don't know.

[fol. 545] Q. I don't know either.

A. It might or might not.

Judge Carter: You mean by that you would depend on what regulation the California Commission made?

The Witness: Exactly, sir. What in its wisdom it saw fit to call reasonable.

By Mr. Phelps:

Q. Your assumption is the carrier himself doesn't even know what he is hauling, is it, General?

A. The driver probably won't know.

Q. I am speaking now of this mislabeling of commodities. You deceive the carrier.

To be sure, it's justified, I think you mentioned before, but in fact the carrier himself is deceived, is he not?

A. No, not if we deal direct with the carrier. The carrier knows.

Q. Oh, the carrier knows what type of commodity?

A. I mentioned that the individual with whom we do business we hope is an individual who has authority to direct the move to his company. His president or vice president need not know. The hustlers on the dock need not know. The drivers need not know. But this man has the authority to say, "Yes," to us, "we will move it. We will move it at such and such a rate and direct it" for his company.

He could be the only one in that particular transporta-[fol. 546] tion company who knows what that commodity is.

That is why—I am sorry if I didn't answer your question properly, but I think it ties in very much with keeping security on a "need to know" basis.

Q. In this present practice of misdescribing the commodity, then, as I understand you now, there is some one person in the carrier organization who does know the nature, is that right?

A. Yes, that is correct.

Q. Isn't it true, General, that from time to time these highly classified items are moved in government vehicles?

A. Oh, yes, sometimes.

Q. Or in equipment that is leased from other carriers—I mean from carriers?

A. Could be.

Q. So that the government has it within its discretion, when there is an item to be moved that is highly classified,

and where national security demands it, the utmost secrecy, the government can move it in its own equipment or in vehicles leased or under its own control, does it not?

A. Yes, it can.

Q. Under those circumstances regulation is not even in effect, is it?

A. No, it is not.

[fol. 547] Judge Lemmon: Could it have the facilities?

The Witness: In some cases it does have the facilities and in some cases it does not.

Of course we are in a rather highly sensitive area here, but there are some cases where we do move highly sensitive items on public transportation. That has occurred many times.

As a matter of fact, from the beginning of the Manhattan Project on, we have moved it in public transportation.

As an example, I can not describe the item, but certain highly sensitive items had to be moved and the Atomic Energy Commission made a very careful survey of all forms of transportation, public transportation, to decide which one was the safest to carry this particular item.

It finally decided that the railroad was. There were various hazards taken with air and highway transportation, transport, in the case of accident, more likely to be lost or create difficulties beyond what it would on rail, and the Atomic Energy Commission decided—we negotiated with the railroads for that particular movement, which was a continuing move over a considerable period of time. It required very heavy equipment for that particular move. Required very heavy equipment, and we handled it with one man.

Well, actually this was two men, a traffic man and an explosives man. They were the only ones on the railroad [fol. 548] who knew what this item was. The Atomic Energy Commission people were there. One man asked him certain technical questions as to the radiation effects of this material. He asked about three, and they apparently were satisfied.

The other man, the traffic man, asked him two or three questions. And I think there were only about ten of us

in that negotiation. These two railroad men, then, right there and then, the traffic man and the explosives man, set the rates. They were the only ones who actually knew. And it was described, I might say, as "military impedimenta."

Judge Lemmon: Take the afternoon recess.

(Recess.)

[fol. 549] Mr. Phelps: Your Honor, I think I had not yet offered in evidence this document now identified as an exhibit entitled "Motor Common Carrier Questionnaire"; I would like to offer it in evidence.

Judge Lemmon: Be received.

The Clerk: Defendant's Exhibit A in evidence.

(Whereupon document entitled "Motor Common Carrier Questionnaire" was received in evidence and marked Defendant's Exhibit A.)

By Mr. Phelps:

Q. Before I leave the subject of what the Commission of California is likely to do, I would like to ask you, General, whether or not you are familiar with what the Commission has done, or has ordered, with respect to the furnishing of other kinds of service, such as gas, electricity, water and telephone to the United States Government?

A. No, I'm not.

Mr. Phelps: I have here, Your Honors, some certified copies of "Rules Governing Filing and Posting of Tariff Schedules for Gas, Electric, Telephone, Telegraph, Water and Heat Utilities, General Order No. 96, Public Utilities Commission, State of California."

I should like to offer these in evidence as showing, on page 10, provision that the Commission has made in the form of a general order applicable to these kinds of utilities I have just described, provision for the rendering of utility [fol. 550] service of various kinds to the United States Government at free or reduced rates.

Judge Lemmon: If there is no objection, it will be received.

Mr. Connell: May it please the Court, as a matter of procedure, I am just thinking in the interests of keeping the record compressed, that I have to make a note on the record that this matter falls under the reserve motion to strike?

Judge Lemmon: I think anything that is received in evidence will be under that.

Mr. McConnell: Under that motion without further notation in the record?

Judge Lemmon: Yes.

Mr. McConnell: Thank you.

The Clerk: Defendant's Exhibit B in evidence.

(Whereupon copies of Rules referred to above were received in evidence and marked Defendant's Exhibit B.)

Judge Lemmon: I can't see the pertinency of that at the present time except insofar as it's in cross-examination of this witness. It wouldn't be pertinent as original evidence in defense, but you have asked the witness if he had known of that ruling would that change his opinion and apprehension as to what might happen. It is pertinent to [fol. 551] cross-examination to that extent.

Mr. Phelps: Yes. Well, Your Honor, I think it would, too. I had in mind offering it as concrete evidence of what the Commission has in fact done.

Judge Lemmon: Of course, that would be your case in defense, not on cross-examination of this witness. But if there is no objection, it will go in evidence.

We will proceed.

Mr. Phelps: Thank you, Your Honor.

Q. Now, before I leave the matter of these moves involving security, General, if it's proper for us to assume that the California Commission will act reasonably, would it not be possible upon proper representations to the Commission for certain provisions or exceptions to be made where moves involve military security?

A: Would it be proper?

Q. Possible.

A. It would seem to me that would be up to the Commission.

Q. But you don't know of any impediment in the way of the Commission's authorizing exceptions to be made in the case of security moves, do you?

A. I know of none.

Q. Now, let me ask you this, General: You have described in some detail the present methods and practices of arranging for government transportation. What is your [fol. 552] opinion of the present system; is it a good system, in your thinking?

A. The present system that we now use?

Q. Yes.

A. It is my opinion that it is a good system.

Q. Is it your opinion that it is presently an efficient system?

A. Yes, very much so.

Q. And is it your opinion that the present practice contains no abuses?

A. All practices can contain abuses. I don't suppose that this practice is any freer of abuses than practices in other fields. Probably there are abuses. Where we discover them, we correct them. We hope they are held to a minimum.

Q. Do you know of any abuses of your own knowledge in the present system?

A. Yes, I know of some.

Q. What are they?

A. Some of which have been corrected.

Q. What are they?

A. Indiscriminate use of Section 22.

Q. Could you enlarge upon that a little bit?

A. Yes. Individual carriers will at times, in order to capture traffic which they might otherwise not have, quote for the Government under the umbrella of Section 22, rates far below the going rate in order to get a small piece [fol. 553] of business. This abuse is very difficult to eradicate. However, the number of carriers by any mode of transportation who resort to that practice are, in the total number of carriers involved, very, very few. In accepting a quotation, such a quotation, we must presume that the individual is a business man who wants to stay

in business, and we presume that he is not quoting a rate which will put him out of business.

Therefore, we are constrained to use that rate, even in the face of knowing it's considerably lower than the going rate. The numbers of abuses of that nature, considering the total number of motor carriers and rail carriers in the country, is very, very small.

Q. I take it your opinion is that that is not a widespread abuse?

A. That is my opinion.

Q. You say that you felt that from time to time the Government was constrained to use a carrier who was quoting a depressed quotation; is that the substance of what you said?

A. That's the substance.

Q. You are constrained to use such a carrier because the policy of the Department of Defense is to require the use of that mode of transportation most advantageous to the Government, isn't it?

A. Considering the requirements of the traffic, yes. By [fol. 554] advantageous, I presume you mean economical as far as dollars and cents are concerned?

Q. Yes. The answer is yes?

A. The answer is yes.

Q. Are you informed of the current thinking in transportation circles with respect to the present procurement system?

A. Procurement of transportation?

Q. Yes.

A. Well, when you say "transportation circles", to what specifically do you refer?

Q. Let me clarify it. Are you aware of what the Interstate Commerce Commission thinks of Section 22 quotations and the practices that obtain under that provision?

A. Only on an informal basis.

Q. Do you know that the Interstate Commerce Commission has rather recently issued a report involving that very question?

A. Yes.

Q. Have you read that report?

A. No.

Q. But you knew it had been submitted, did you?
A. I knew.
Q. Weren't you interested in what they had to say?
A. Yes.

Mr. McConnell: May it please the Court, I object to this line of inquiry. I don't know just exactly where it is [fol. 555] leading. But here we have an issue that is presented squarely to the Court. There is no doubt about the fact that there has been a great deal of dispute and pushing back one way and the other about this particular thing. As a matter of fact, this proceeding grows out of just such a pulling and leverage of forces. It would seem to me to be collateral and rather remotely concerned in trying to get to the facts here to see how this sort of dynamic struggle has been going along in other quarters of the Government, and I seriously question whether or not it doesn't come into the category of bringing in the opinion on the main issue before the Court at this time to go into another proceeding at which we were not present, nor at which the General was not present.

We will all admit there has been a concerted effort to abolish this particular type of government procedure. The position is solidified now, as the General will testify to, that after all of the sopping and the working back and forth of various forces the firm stand is now taken. And that is the point.

[fol. 556] Judge Lemmon: I think the proper ruling is that in so far as it is cross examination of this witness, it may be gone into.

Mr. Phelps: I have here, if Your Honors please, what appears to be a reproduction of the report of the Interstate Commerce Commission on Senate Bill No. 1920. I do not have it certified. I will show it to counsel, and I should like to read into the record a portion of that report with respect to this subject matter and then ask the witness whether or not he agrees with it.

Mr. McConnell: May I see it before you read it?

Mr. Phelps: Yes, sir, (handing to counsel).

Judge Lemmon: The ruling was that it could be used in the cross examination of this witness, but it should be

reserved by you to your putting in your own defense. I think the objection would be good to reading it into the record at the present time.

By Mr. Phelps:

Q. I will show you, General, and invite your attention to page 31 of the report I refer to, which is dated December 23rd, 1955, commencing with the last paragraph on page 31. You need not read it aloud to yourself. The fourth paragraph beginning at the bottom of page 31.

A. Including the wording of the proposed draft?

Q. I have no objection to it, but I wanted to invite your [fol. 557] attention particularly to the paragraph that ends at the top of page 32. Does the reading of that paragraph, General, cause you to change your opinion as to the merits of the present procurement system?

A. It does not.

Mr. Phelps: I have here, Your Honors, a document as described "Revision of Federal Transportation Policy. A Report to the President. Prepared by the Presidential Advisory Committee on Transport Policy and Organization, April 1955." That is a report. It contains on the first inside page a letter of transmittal signed by Sinclair Weeks as chairman of that committee.

Mr. McConnell: I object to the use of this further in cross examination. We are getting into matters which every one knows have been carried to the legislative forum. We are getting into controversial reports that have been criticized.

Judge Lemmon: He has not offered it in evidence as yet.

Mr. Phelps: I would like to make the same use of this one as the preceding document, if I may.

Judge Lemmon: The same order as previously made.

By Mr. Phelps:

Q. General, I will ask you to read, if you will, the material on page 19 of the document I just described entitled "Special Governmental Rates."

[fol. 558] A. (Witness perused document)

Q. Does a reading of that portion of that document cause you to change your opinion as to the merits of the present system?

A. I would like to qualify my answer to that question by stating that one of the signatories to that report was the Secretary of Defense and therefore, so far as I am concerned, it is the policy of the Department of Defense. Personally I, however, do not agree with it. I would like to say that I have worked with Section 22 of the Act for a number of years, and I would like to further state that it does not go merely to rates and charges. It goes to arrangements, arrangements for diversion and reconsignment of goods under tariffs which ordinarily would not permit it, a flexibility of arrangements which must be in effect at 5:00 o'clock this afternoon and not the 5th of June. It goes to many other things besides the mere cost of transportation. To deny the military that flexibility and facility is, in my opinion, unwise.

Q. Are you familiar with a report to Congress submitted by the Commission on organization of the executive branch of the government, the so-called Hoover Committee?

A. I am.

Q. You have read this one. Does the reading of that report cause you to change your opinion with respect to [fol. 559] the merits of the present system?

A. You mean as it refers to Section 22 of the Act?

Q. Yes.

A. It does not.

Q. Isn't it true, General, that the present system, embodying as it does the practice of making use of unpublished special rate quotations invite abuses?

A. When you say "unpublished" you mean unpublished as tariffs are published?

Q. Yes, so one carrier does not know what another's rate is.

A. Those rates are all on the public file and are available to all carriers, competitors and non-competitors, so in effect the interstate carriers have available to them at any time the rates that their competitors might quote.

Q. Is it your testimony, General, that all of these special rate quotations to which we have been referring are public

documents in the sense that anyone may have access to them and read them?

A. They are not public documents. They are on public file in the office of the traffic manager of the Department of the Army so that anyone interested in that traffic may have access to them. They are not a public document in the sense that you can buy for ten cents a copy of each one from the public printer.

[fol. 560] Q. Isn't it true that the present practice also involves this element—isn't it true that the Army, the Navy, the Air Force, the General Services Administration, all in their various regional offices have their own sets of tariffs and special rate quotations?

A. I can't speak for the General Services Administration. However, for the military departments that is generally true.

Q. So that you have a duplication, have you not, of tariffs and rate quotation libraries?

A. We do. In the Army we have four, in the four regions I mentioned.

Q. Do you think that is very efficient?

A. Well, reading further in the report of the Hoover task force you will find that certain recommendations were made toward that inefficiency. The Secretary of Defense has seen fit to go along with that particular recommendation and is doing something about the alleged inefficiency of the system as it was when they made the report. There will be a consolidation, yes. However, the question as to just how the new organization will be is not yet decided. There will be more than one tariff library, I can assure you.

Q. If you were in a position to make recommendations to Congress with respect to the merits of the present procurement system, would you advocate the preservation of the present system or would you advocate certain reforms in the present system?

[fol. 561] A. I would advocate one change.

Q. And that is?

A. A wording the Act to regulate interstate commerce to allow of such administrative procedures as would prevent the abuses which I mentioned a while ago. I said we were constrained to accept a low rate. We are constrained

to do so because if we do not, then in the opinion of some people we are squandering the taxpayers' money. We do not want to be placed in that position. Therefore, if administratively we could have the authority and the Controller General of the United States also had the mandate from Congress, we could so administer Section 22 as to prevent these very abuses. That is the only change I would recommend if I were asked for my recommendation.

[fol. 562] Q. The abuse to which you have referred, as I understand it, is the abuse whereby cutthroat competition depresses rates to an unreasonably low level, is that right?

A. I don't choose to call it cutthroat competition. I choose to call it unremunerative rates by isolated carriers in an effort to get a piece of business they otherwise would not.

Q. Yes?

Judge Lemmon: How much longer are you going to cross examine?

Mr. Phelps: I think another five or ten minutes, Your Honor, and I will be through.

Q. I take it, then, General, that you would recommend to Congress, if you were called upon to do so, that steps be taken to prevent, to the extent that Congress can do so, this kind of abuse which you have just described?

A. That is correct. Administrative change so that we may administrate the present situation of the present Section 22 for the few carriers who might be prone to offer unremunerative rates which, as I stated before, I feel are in the minority but which cast reflection upon all of Section 22 in which all of these arguments which you have cited here have made a great furor about.

What we are doing in this Section 22 is, we are spanking all of the children just because a few are naughty. I don't [fol. 563] think that's right. I think if the law is good—and the law is good because both the Commission and the Secretary of Defense say we need it in times of war.

If the law is good, the law should stay on the statute books. But it should be properly administered. That is our fault—our fault, the Government service. It should stay on the statute books and permit the flexibility that the military needs.

Just because a few carriers feel that they are being hurt, just because a small minority feel that a particular statute is not good, does not necessarily make the statute poor.

Q. If I understand you correctly, General, you are taking the position that you would recommend to Congress a revision of the present Section 22 of the Interstate Commerce Act in order to remove these abuses which you have described?

Mr. McConnell: I don't want to interrupt. This is an interstate commerce act which we are discussing, that this line of inquiry goes into. In the transportation field they use Section 22 indiscriminately.

That it has been the focal point of conflicting economic forces I think everybody that reads the daily paper knows. It is a highly controversial field.

However, Section 22 is a thing apart from a regulation by a state on rates changed for the movement of govern- [tol. 564] ment materiel as it goes all through this logistical pipeline that we talk about. It would seem to me to get it into this controversial area, particularly for a gentleman in the position of our witness, is a highly questionable procedure and one of doubtful value.

Mr. Phelps: I don't understand there is an objection pending. I think I was in the midst of my question.

Judge Lemmon: I think the three judges here feel that, while probably it is technically proper cross-examination, we doubt if this line of inquiry is going to be helpful to the Court.

Mr. Phelps: Then I should be happy to desist, Your Honor. There is one more matter I would like to touch upon and then I will be through.

Q. You have told us, General, that you are a professional soldier and that you have been for many years. As a professional soldier it is your duty, is it not, to anticipate war?

A. I would say, rather, prepare against a possible future war rather than to anticipate war.

Q. Yes. I accept your substitute description.

Your training as a military man has been such as to cause you to reflect upon and look forward to and to project yourself to the point of armed conflict, has it not?

A. I would like to have that read back, please.

(Question read.)

[fol. 565] A. Well, I certainly don't look forward to it, nor do I necessarily project myself into it, nor does the average professional soldier.

Q. Not look forward to it in the sense of pleasure, General?

A. We prepare against a possible future war, yes, I would like to leave it there.

Q. Yes. And is it true that your opinion generally, and particularly the opinions you have expressed here, have been colored and influenced by that orientation of yours toward warfare?

A. I think that is why I draw my salary.

Q. Well, could you answer that?

A. Yes. The answer is "Yes".

Q. They have been influenced?

A. Certainly.

Q. We don't presently have any armed conflict, do we, General?

A. Not at this very moment, no.

Q. And isn't it true that President Truman terminated the emergency at the end of the Korean War by proclamation in October 1952?

A. President——

Q. Truman.

A. President Truman? I don't recall the exact date on [fol. 566] which it was terminated.

Q. Isn't it true, General, that Congress keeps itself informed through its committees, from day to day if not hour to hour, of international developments?

A. I can't answer that question.

Q. You don't know that? You have heard, I dare say, of the Senate Foreign Relations Committee?

A. Oh, yes.

Q. And of the House Armed Services—House Foreign Affairs Committee?

A. I have.

Q. And isn't it true that those committees frequently are briefed by the Joint Chiefs of Staff and officers of the Secretary of State upon international developments?

A. I know they are.

Q. Having in mind that Congress has it in its power, General, to take whatever measures it sees fit when, as and if we have an emergency, do you think that we can safely entrust our national destiny to Congress?

A. The answer is "Yes".

Mr. Phelps: That is all, Your Honor.

Judge Lemmon: Any redirect examination?

Mr. McConnell: May it please the Court, we have no redirect examination at the present time, if we may call General Lasher tomorrow, possibly.

[fol. 567] Judge Lemmon: Will the next witness be one that will take considerable time on direct?

Mr. McConnell: The direct examination will probably take 20 minutes at the most, and most of our witnesses are in that category.

Judge Lemmon: Well, put him on.

Judge Carter: Thank you very much, General.

(Witness excused.)

Mr. McConnell: Colonel Hall.

May it please the Court, after reviewing in my mind the question of whether or not Colonel Hall's direct examination will take 20 minutes, it will probably take a little longer than 20 minutes.

Judge Lemmon: We will proceed.

Mr. McConnell: Proceed, and if at any time—(remark unfinished).

Colonel George A. Hall, called as a witness on behalf of the Government; sworn.

The Clerk: Please state your full name and your rank to the Court.

A. George A. Hall, Lieutenant Colonel, Transportation Corps.

Direct examination.

By Mr. McConnell:

Q. What is your present assignment in the Army, Colonel Hall?

[fol. 568]—A. Presently Chief of the Transportation Division of Sharpe General Depot at Lathrop, California.

Q. Can you explain the duties of your office as Chief of Transportation at Sharpe?

A. Well, I am responsible for the procurement of the freight and passenger transportation at the depot.

Q. Could you tell the Court the area that the depot supplies there at Sharpe?

A. Well, Sharpe General Depot is the point of receipt, storage and issue of supplies, and for certain types of equipment we also have a maintenance and repair function. That includes certain medical items and heavy engineering equipment, principally.

We are responsible also for the issue of special supplies as are in storage.

Primarily we supply Oakland Army Terminal. I would say if we could say any one class of shipment was any more important than another, Oakland Army Terminal is our primary mission for export traffic.

Next, we supply installations within the State of California with various classes of supplies as I mentioned—Fort Ord, Camp Irwin, Presidio, and we are liable to ship also to Air Force and Navy installations.

[fol. 569] Three, we supply practically any destination. As a matter of fact, we ship not only to the military, we have upon recent occasion been called upon to ship very extensively to civilian supplies. Actually, sir, about 40 per cent of our traffic moves in any regular pattern and the balance of it is very, very scattered—very scattered.

Q. You serve parts outside of the State of California as well as inside the State of California?

A. Oh, yes, we do.

Q. Could you name some of those important points?

A. Well, we ship to points in—primarily in the West Coast, in the Sixth Army area, eight western states, although upon occasion—I believe General Lasher went into considerable detail on the depot supply system. For example, for a concrete example, one of our big businesses at Sharp General Depot is canned goods—subsistence. That is natural, since California is quite a large producing state and Sharp is the original point of storage on a large

percentage of the canned goods that the armed services procure.

Approximately 90 per cent of that goes to destinations in the eastern part of the United States, and a large percentage of that is further exported. In other words, we originally receive the canned goods in the depot and issue it out in a generally general easterly direction, as previously described under the depot system.

[fol. 570] Q. About what percentage of the material that you have at Sharp comes from states other than the State of California?

Mr. Phelps: Now just a moment, Your Honors please. If this question contemplates an answer based upon the witness's personal observation, which I think is inconceivable, of all of these movements in and out, that's one thing; but if it is predicated upon certain figures, tonnage figures and movement figures in the form of shipping records, I suggest that the best evidence for that is those shipping records and I object to this witness's testifying as to these percentages, because it is hearsay in the absence of the best evidence.

Mr. McConnell: Well, he has been setting up that chart. I will withdraw the question.

Q. How long have you been at Sharp General Depot, Colonel Hall?

A. Approximately one year, since the 1st of April last year.

Q. What were your duties before you had the Sharp General Depot?

A. Well, since I have been in the Army since 1942, I have served in various capacities, always in the Transportation Corps. I have served at ports, I have served overseas in positions which you might say quite similar to the present one, its traffic management functions, although [fol. 571] in overseas destinations I have—overseas locations, I was actually involved in operations to a considerable extent, having had the truck companies and battalions and so forth under my direction.

Just prior to coming down here I was at the Fourth Transportation Zone as the chief of the Freight Traffic

Division. I opened the Freight Traffic Division at the Fourth Transportation Zone in November of 1952, and was there until April 1st of last year.

Q. Where is the Fourth Transportation Zone's headquarters located?

A. At Salt Lake City, sir.

Q. What were the duties of your office there in the Fourth Transportation Zone at Salt Lake City?

A. Well, the Fourth Transportation Zone as well as all the other zones, our primary interest is efficiency in transportation, getting the best transportation that will satisfy the military requirements at the lowest cost.

Q. How long did you serve as the chief of transportation in the Fourth Zone?

A. Chief of the Freight Traffic Division, Fourth Zone. That would be from November of 1952 until the 31st of March 1955.

Q. Did you have an opportunity then to observe in a supervisory way the operations at Sharpe General Depot? [fol. 572] A. Yes, I did. It was a very good opportunity there at the Fourth Zone to become familiar, particularly with the California carriers. Roughly 50 per cent of the traffic routed by the Fourth Transportation Zone is——

Mr. Phelps: Just a moment, now, if I may interrupt you.

By Mr. McConnell:

Q. Be responsive to the question, Colonel Hall. I think that is getting a little far afield.

A. Well, I will change that answer to say instead of referring to traffic, I will say that roughly 50 per cent of the activity of the zone office is in connection with California carriers.

Mr. Phelps: Just a moment. I move to strike that, Your Honors.

By Mr. McConnell:

Q. Still not responsive. If you will strike that and read the question.

Judge Lemmon: It may go out.

(Record read.)

A. Yes, at Sharpe General Depot and California in general.

By Mr. McConnell:

Q. Based upon your observation from the Fourth Zone and at Sharpe itself, do you have a rough idea as to just what percentage of the material coming into Sharpe comes from states other than California?

Mr. Phelps: Yes or no, please.

A. Yes or no as to the percentage? Yes, I have a very good idea.

[fol. 573] By Mr. McConnell:

Q. About what percentage, from your observation comes from out of state?

Mr. Phelps: Just a moment. I object to the question for the same reason as before. It is based upon—it is impossible—it is based upon observations of all of these moves as they take place, as an eye witness——

Mr. McConnell: There are certain things, if the Court may please, judging the speed of a car or velocity of a material——

Judge Lemmon: We are prepared to rule. The objection is overruled.

Mr. McConnell: Trying to shorten this proceeding.

The Witness: All right. May I proceed?

Judge Lemmon: You may answer.

The Witness: Thank you, sir. I will have to qualify that a bit and say that we have inbound material originating in the State of California flowing east, and we have westbound material, manufactured items, principally originating in the East, which are in their general flow surging westward.

We have—I would say of the shipments, the westbound shipments, manufactured items coming west, that approximately 75 per cent is from without the State—at least 75 per cent—we have a very, very large volume that origi-

nates within the State of California, fully 90 per cent of [fol. 574] which finds its destination on the East Coast. That is the subsistence items previously referred to.

By Mr. McConnell:

Q. About how many items do you carry in the depot at Sharpe, Colonel Hall?

A. Well, sir, of course that varies from week to week and day to day. When I left Sharpe, which was last Thursday, we had 61,800 line items. Now, that does not include the items that are used in repair and maintenance, nor the items themselves that are in maintenance, such as bulldozers and locomotives and that sort of thing. It's 61,800 line items for issue.

Q. Would you name some of the heavy equipment you carry at Sharpe?

A. Well, we have locomotives mothballed, marine engines, bulldozers, piledrivers, among the heavy equipment, steam rollers, items of that nature. Was the question just dealing with heavy equipment?

Q. Yes.

A. Earth moving equipment, that type of thing; engineer heavy equipment.

Q. Do you supply any troops in the field from Sharpe General Depot?

A. Oh, we do. We supply posts, camps and stations, principally in California, but anywhere upon call, and of course all of our export material eventually finds its way for issue to troops.

[fol. 575] Q. You mean that material that is shipped through the Oakland Army Base is mostly destined for shipment overseas?

A. Yes, sir. Everything we would ship through Oakland Army Terminal would be 99.9 per cent for overseas. They may have an occasional ship, oh, of rope or material like that for use at the port, but for practical purposes it is all export.

Q. What about the shipments to Fort Ord?

A. Fort Ord is a typical camp post or station. Our troops are in training there. We have shipments which go there

quite regularly. Generally our shipments are quite mixed. The type of shipment we ship, particularly on a training order, such as Fort Ord will be, they are quite amazing.

Q. Will you explain to the Court the machinery that you use there for arranging the rates for transportation of the materiel that moves out of Sharpe Depot?

A. We do very, very little rate work in the office itself. Of course, we go back upon the zone for our routing and rate information. There is very little call for us to do any rate work.

To go into a bit of detail on the system, a requisition is received at the depot. The requisition is processed by the stock control people at the depot and comes to the transportation officer at the depot. We endeavor to consolidate small shipments to make truckload or carload shipments. [fol. 576] When we accumulate a truckload or carload or more we go to the zone and request a routing from the zone, depending upon the zone to provide us with efficient transportation.

Q. Do you have a pretty well ingrained pattern of traffic growing out of your operations at Sharpe Depot?

A. To the extent that we ship primarily to Oakland Army Terminal for export, which is, after all, the main reason that Sharpe Depot is where it is. We do have a lot of traffic to Oakland Army Terminal. Other than that it is rather scattered.

Q. What are the rates for the shipment that flow in this channel of traffic down to Oakland and around there?

A. What was the question—how are the rates?

Q. How the rates would go in the regular flow to Oakland.

A. We generally ship under the various freight "all kind" rates which are now in effect in various rate tenders. We have a very adequate set of Section 22 and rate tenders under the State regulations.

Q. What do you mean by a rate tender?

A. A tender made direct by the carrier to the Department of Defense.

Q. Are those tenders made voluntarily by the carriers?

A. Oh, they are invariably voluntary. The law is permissive, not directive.

Q. Do you ever solicit tenders?

[fol. 577] A. We do, sir. There are some solicited tenders. Of course, not on the level in which I am engaged at the present time. That is on the Washington level. You might say that we occasionally are responsible for the action which will occur at a higher level. If we hear of a particularly large movement coming up, we will refer it—I will refer it to the fourth zone, who will in turn refer it to the Chief of Transportation.

Q. Do you have any movements that do not flow in regular pattern but are sporadic in nature from Sharpe Depot?

A. Yes, sir, we have quite a few. For example, since the first of the year we had one ship that came in—correct that first of the year—this was just prior to the year. We had one ship that came in with eight million pounds of steel fence posts. We put that ship up at the Port of Stockton. It was quite an efficient movement from the Port of Stockton to the depot at Lathrop, some 13 miles. It worked out very nicely for the carriers as well as the Government.

We had another ship with approximately six million pounds that came in ten days later and we couldn't use the Port of Stockton because meanwhile we had had a flood and the Port of Stockton was actually closed for practical purposes for some two weeks. Of course, we could not hold the ship out in the harbor waiting for the flood to subside, so [fol. 578] we had to unload that in Oakland.

Q. How did you arrange the rates for these unusual shipments?

A. We simply referred it to the zone office, who in turn referred it to the office of the Chief of Transportation, who negotiated with several carriers. In this particular case it took carriers with quite a bit of equipment. There was a lot of tonnage to move in a short space of time.

Mr. McConnell: If the Court please, for the advice of the Court, I think very shortly we will get into some of the ways in which the state regulation would interfere with the operation at Sharpe through the testimony of this witness. I know the Court has indulged us by running over its usual time. I think we could start off and get more continuity out of this tomorrow, if that would be the pleasure of the Court.

Judge Lemmon: Very well. We will recess until tomorrow morning.

(Whereupon an adjournment was taken until Tuesday, March 20, 1956 at 10:00 A. M.)

[fol. 580] TUESDAY MORNING SESSION, March 20, 1956, 10:00

GEORGE A. HALL, called as a witness on behalf of the plaintiff; previously sworn.

Direct examination (Resumed).

By Mr. McConnell:

Q. Colonel Hall, to go back just a little to the testimony yesterday, about what percentage of the supplies coming in and going out of Sharpe General Depot either comes from out of the State into the depot or goes out of the State or the country out of the depot?

A. 90 per cent, approximately, of our traffic is interstate.

Q. 90 per cent?

A. 90 per cent.

Q. About how much materiel comes into the depot per month?

A. The turnover is approximately 15,000 tons per month at the present time, in and out.

Q. What percentage of that materiel coming in is consumed at the Sharpe itself?

A. That would be a very negligible amount, just what we would use in the maintenance and support of the depot itself; less than one per cent.

Q. Is it the policy to keep the inventory at the Sharpe as low as possible?

[fol. 581] A. Consistent with military requirements, yes.

Q. Are goods which come in through the depot from out of the state and goods which come in to the depot from within the State of California commingled together?

A. Yes, sir. They are very much commingled.

Q. Can you give several illustrations of that?

A. We have, for example, some ore, which is a strategic material, that is, General Services Administrations' ore. We have one big pile of ore now at our Tracy Annex, part

of which is import, part of which is from within the State of California, part of which has come from adjoining States. In unloading this ore from the carriers' equipment, we put it all in one big pile. We could not possibly segregate that. The same applies to other types of equipment—supplies. There is our heavy machinery, for example. I noticed last week three pieces of heavy earth-moving equipment. They are the Bucyrus-Erie equipment, which came from the State of Ohio originally. There is one piece of equipment which has never been issued and is sitting in its storage location. Alongside of it is another piece of equipment which looks the same. That has been to the Orient and has been returned. It has gone through our maintenance and it now looks the same as a brand new one.

We also have an identical piece of equipment which came in from Ohio. It was issued during the flood for emergency [fol. 582] work upon the levees. Now that is back. I presume that that latter one now would be an intrastate piece of equipment.

Q. You need not go into the legal conclusions, Colonel Hall. How long did it take you, for purposes of your own information, to determine the history of those various machines?

A. I spent about three hours myself working back from the serial numbers of the machines to find out the exact status, the history of each piece of equipment.

Q. What about your small equipment like nuts, bolts, and so forth?

A. They are, of course, segregated by size and type of equipment, but they are definitely not segregated by points of origin. They are in bins and drawers, segregated by size and type, but not by origin.

Q. Colonel Hall, what carriers serve Sharpe General Depot?

A. We have two railroads: the Southern Pacific and the Western Pacific. We have a large number of motor carriers who are authorized to serve the depot. There are some 16,000 radial permitted carriers within the State, all of whom could serve the depot. Actually throughout the year we will not use more than about 20. On the routings issued by Sharpe last month, we used seven carriers, six of whom have both a radial permit and a certificate.

Q. Colonel Hall, are you familiar with Defendant's Ex-
[fol. 583] hibit A called A Motor Carrier's Facilities Questionnaire?

A. Yes, sir, this is a DD form, Department of Defense form 677. It is commonly known as the facilities file.

Q. What is the purpose of that file?

A. A facility file is an operating file. It has nothing to do with rates at all. In determining a motor carrier routing in the absence of any other data, each carrier who participates in army traffic gets one of these facility files, which shows the amount of equipment he has, the types of equipment he has, and in general where he operates.

Q. What is the purpose of having him state at Roman numeral II, "Give information with respect to whether or not his certificate is interstate or intrastate."?

A. Well, about the only time that we are concerned is in connection with outbound movements from the depot. If it is going to the port, we naturally assume that it is going to be interstate and we are very careful to use interstate carriers. Other than that, it has no relationship to the status of the material that comes into the depot. It is the outbound movement with which we are concerned, but this form is basically to give us a picture of each carrier, the line from which he operates, and the amount and type of equipment that he has.

Q. As a practical matter, in determining whether or not the carrier is authorized to go either interstate or intra-
[fol. 584] state, do you have any difficulty in making a determination with respect to the character of your materiel in the depot?

A. We do not know what our materiel is. As stated, we have our interstate and intrastate materiel so commingled that we could not possibly segregate it.

Q. How do you select the carriers when you have that problem present?

A. Well, if there is any doubt in the matter, we have many carriers who have both a permit and a certificate. 477 carriers within the State have a certificate as well as the permit.

Q. Do you mean by that they are authorized to carry interstate as well as intrastate?

A. That is right, sir.

Q. Are all the railroads operating at Sharpe Depot authorized to carry it either interstate or intrastate?

A. Frequently—I won't say "frequently"—upon occasion we have used rail when there was a matter of doubt, because all railroads are both inter- and intrastate.

Q. About what percentage of your motor carriers serving the depot have both interstate and intrastate rights?

A. Well, of those we used, as I said, last month, on our own routings from Sharpe, we used seven carriers, six of whom had interstate rights.

Q. If the Commission assumed jurisdiction over the [fol. 585] regulation of rates on your shipments from Sharpe, would you have difficulty in determining what materiel was in fact interstate and what was intrastate for the subject of such regulations?

A. We couldn't. I mean, it would just be impossible at the present time.

Q. Colonel Hall, does Sharpe General Depot perform any missions other than the supplying of the armed services?

A. Yes, we do. I imagine we store strategic materials. We also serve as a source of supply for disaster of any type.

One normally thinks of the Army in connection with a military disaster. Actually, that is not entirely correct. Take the recent flood. We are prepared, ready to go to work in case of any civilian disaster.

During the flood we shipped approximately 225 truckloads of either flood relief material or equipment to fight the flood.

Q. Do you have the responsibility for the relief of earthquakes? Is that in your specific mission?

A. At the present time, sir, the sources of danger in the area are considered, number one, earthquake; second, fire; third, flood; fourth, enemy action. We are prepared to go on 24 hour duty in the event of any disaster.

Q. When you shipped this equipment to the flood area for the relief of the disaster there and to prevent any [fol. 586] further flooding, did you use commercial carriers as well as military carriers?

A. We used mostly military carriers. When the flood

first broke, we didn't have much time to prepare. We started shipping within a matter of hours. After we got organized a little bit better, we began using commercial carriers.

Q. Now, how were those commercial carriers paid?

A. They are paid out of federal funds. Not out of army funds, but they are paid out of federal funds, civilian defense funds.

Q. Do you know how the rates for that carriage were arrived at?

A. The last information I had, it had not been settled as yet. There are several matters involved, delays to equipment, and so forth.

Q. I notice that the statute provides a carrier may carry for nothing for patriotic purposes. Do you recall whether any carrier actually carried for nothing there at that time?

A. I can't answer that. I will say the carriers were one hundred per cent thoroughly cooperative, but what financial adjustments have been made, I can't answer.

Q. Colonel Hall, in your experience in military traffic at Sharpe and elsewhere, has it been your observation there are a number of movements that take place that [fol. 587] are so urgent and to out-of-the-way places so that there is no appropriate rate structure for such movements?

A. Yes, sir; that is true.

Q. Could you give just several illustrations of your experience that are typical?

A. Well, one good example, I believe, is a shipment of ammunition boxes. We had an ordnance installation that had been producing 45 caliber ammunition. Overnight that particular installation had to retool to produce another type of ammunition on emergency requisition.

It left the installation with three million pounds of boxes in which this 45 caliber ammunition would be shipped. Those boxes had to go to another ordnance plant to enable the shipment of the 45 caliber.

There were no rates other than a class rate. It is a commodity that you won't find in commercial practice at

all. Ammunition boxes would be very limited in commercia ttransportation.

This was rather an emergency. At that particular time I phoned the office of the Chief of Transportation and suggested that it might be appropriate to look into the rate situation, that the last rates were extremely high. Oh, within a matter of hours we had our clearance establishing the rates, the routes and the trailer interchange points, and so forth. Approximately four or five hours.

[fol. 588] Q. When did the movement start after you had notice it had to take place?

A. It started about noon the day after we got—after we received the original request for shipment.

Q. Can you think of another typical illustration just out of your recent experience?

A. We have had a shipment of—we did have recently a shipment of tanks from Camp Irwin. At the present time, of course, we are not actually in combat, but we do have a training mission which is very vital that the training mission be kept on schedule. Camp Irwin in Southern California is the tank training center for the United States.

The tanks receive very hard usage at Camp Irwin on the desert. They must be returned on a regular schedule to an ordnance plant for repair and necessary maintenance.

Again, it was an ordnance situation, as I mentioned a moment ago, in connection with ammunition boxes. The ordnance plant that had been effecting these repairs suddenly had to undertake a new mission. It was necessary to seek a second installation to effect the repairs to the tanks.

The same situation, same practice, was followed in that case. The matter was referred to the office of the Chief of Transportation, who in turn discussed the situation with the carriers and the rates were effective without delay. We were able to continue shipping the tanks and the train-
[fol. 589] ing program went on on schedule.

Q. Colonel Hall, did you have any experience in transportation and rate matters prior to your entering the military service?

A. I started to work for the Union Pacific in 1928, and my work was always in either tariffs or in rates until 1942.

Q. That was about 12 years with a commercial and industrial traffic management?

A. Approximately.

Q. How long have you been in the military?

A. Since 1942. In other words, 12, 14 years.

Q. From your points of observation from both the industrial and commercial and military, do you feel that there is an essential difference between the two types of traffic, so far as requirements of traffic management are concerned?

A. Well, I would say that there were many points of difference. After all, if I may put it this way: If I am conducting a military operation, if I were overseas I would have in addition to such commercial facilities as may be available overseas, I would have my own truck companies, motor pools and trucking battalions, which allows me as an army traffic manager a very flexible operation.

Here in this country the commercial carriers are my truck companies. I need them in just the same situation as [fol. 590] I would need them overseas. But the truck companies here represent my organic military transportation.

And our entire operation must be very flexible. Above all, I would say that that was our greatest need, is flexibility.

I would like to quote, if it is permissible, briefly in part from a statement recently made by General Maxwell D. Taylor, who is Army Chief of Staff, which I think expresses it better than I can.

Mr. Phelps: Just a moment, Colonel. I think we would all find General Taylor's opinion interesting, but in view of the fact that General Taylor is not here, I think it is objectionable to have this witness express General Taylor's opinion.

Mr. McConnell: May I have a little voir dire on that?

Q. Where did you read that statement, Colonel?

A. Well, General Taylor published a brief statement in a small pamphlet called The Officers Call. It is a publication which comes out once a month and it is required reading for all officers.

Q. In other words, it is a communication to you of the policy that you would generally follow, is that correct?

A. That is correct. It is a monthly statement from the Department of the Army.

Mr. McConnell: May it please the Court, with that burden in the record, I submit that this is something that relates to the way Colonel Hall, and of necessity his organization, would carry on their operations, statement by the Chief of Staff of the policy——

Mr. Phelps: I think at the very least, Your Honor we might have the document itself or the paper containing this opinion.

Judge Lemmon: The document itself would be the best evidence.

Mr. McConnell: Well, we will submit that at a later time.

Judge Lemmon: I understand this is an opinion of the General's that you adopt as your own?

The Witness: Yes, sir; that is correct.

Judge Lemmon: It may be submitted.

Mr. McConnell: May it come in on that basis?

Q. Will you just read it, then, as an opinion which you adopt as yours?

A. Correct. General Taylor says:

> "Superior mobility and fire power will mean little unless we can feed, supply and transport the combat units by the most modern means under the most competent and effective control. The supply and transportation system must be capable of flexible and rapid operation. It must be capable of quickly adjusting to [fol. 592] changes. Since land lines of communication and large logistic installations are vulnerable to atomic attack, we must rely on a system of small depots."

It was just stressing my opinion of our need for flexibility in our operations.

Mr. Phelps: If Your Honor please, I think that what the witness has said is not responsive to the question that was asked of him, which was, as I recall it, the difference between commercial type traffic and military traffic.

I ask that the answer be stricken as not responsive.

By Mr. McConnell:

Q. Do you feel that there is the same requirement for flexibility in commercial traffic as there is in military traffic?

Mr. Phelps: Just a moment, counsel. I have addressed a request to the Court that the witness' answer be stricken. I would like to have a ruling on that motion.

[fol. 593] Judge Lemmon: The motion is denied.

By Mr. McConnell:

Q. Colonel Hall, you are familiar generally with the California statute regulating the rates of both carriers of various types, are you not?

A. Very generally, yes.

Q. In the event that this restraining order were lifted at this moment and the statute as you understand it went into effect, what effect would it have on your operations at Sharpe?

Mr. Phelps: I wish to raise the same objection to this question as before, Your Honors, and I assume there will be the same ruling. I wish the record to show that I object to the form of the question, on the ground that it is calling for this witness to express a conclusion upon the ultimate question involved in this case.

The Court: Overruled.

A. Well, I can't imagine operating under such circumstances. The situation in my office would be completely chaotic. I would say that where I am now shipping in truckload lots these mixed truckload shipments we have, I would be shipping at L.T.L. class rates rather than our truckload all-freight, all-kinds rates.

Q. In general, would it affect the level of your rates that you had to pay?

A. I would say that it would. It is a very broad subject. [fol. 594] However, we have a great many shipments, truckloads of very mixed commodities. The division of training at Fort Ord, for example. A single truckload will have everything from medical and dental instruments

to helmets and helmet liners. We try at the present time to consolidate these loads into truckload lots to insure full utilization of the equipment. We do considerable work towards breaking down our shipments into truckload lots, which seems to me we would be shipping very largely, these mixed shipments, at less than truckload class rates.

Q. And that would be an uneconomical use of trucks, I take it, would it not?

A. I presume we could ship without any consolidation whatsoever; just ship a growing multitude of small L.T.L. shipments. Where, as I say, a single shipment might include now a great variety of items, we would ship each one separately at L.T.L. rates.

Q. Might it affect a shipment which was urgent in nature?

A. Well, our operation would be so much retarded, I presume that it would. We would have a lot of additional rating to do other than the physical handling, as I see it. I only have one rate clerk in my office who is rating comparatively few shipments now. As I see it, he would be rating a good many under the circumstances described.

Q. Could you give an illustration of the way you operate [fol. 595] now on one of these shipments and then contrast it with the way you would have to operate under the regulations?

A. Well, the procedure at the depot—I believe it is general in most shipping installations—the requisition is received in the stock control division of the depot.

Q. Take some concrete requisition which has actually happened and is typical.

A. Let us say a requisition from Fort Ord, since I used Fort Ord as a division of training there. A requisition will be received from Fort Ord for supplies for the division. It goes to the stock control division. Within a very short time, approximately one day after it is received in stock control, the requisition, the papers that result from the requisition, come over to transportation, and it is at that point that we endeavor to work out whatever consolidations we are able to work out.

Q. About how many different items might be requisitioned?

A. Well, there could be 61,800, but there seldom is that. I would say at the average truckload.

Q. Not truckload. Requisition.

A. The average requisition that we receive at Sharpe will have as many as 50 line items as an average, some fewer, some greater.

Q. Go ahead with the illustration.

A. We receive the documentation. We do our cargo plan- [fol. 596] ning at that time, if we can work up to a truckload lot by consolidation. We go to the Fourth Zone for a route and release order, and the truckload is subsequently shipped. If I understand the situation correctly, as I see it, there would not be much point in our endeavoring to consolidate if the restraining order were lifted. We would ship a great multitude of very small shipments.

Q. If you did try to consolidate, would there be a problem of segregating for the purposes of meeting the rate classification?

A. Well, yes. We would have to do that. If we did try to consolidate it all, we would have to try to consolidate according to the freight classification rather than the present broad description that we are now able to operate under.

Q. Would that be a considerable burden on your office?

A. It would be a considerable burden upon my office. I would guess it would increase our costs of billing—I am talking of the billing alone, the accomplishment of the paper work—some 40 per cent. It costs us $1.71 at Sharpe to issue each bill of lading. That is just the paper work of having a bill of lading prepared. The more complicated it becomes and the more bills of lading are that we issue, obviously that cost is going to go up. Of course, it would result in additional costs out on the shipping floor.

[fol. 597] Q. Explain that a little bit, how the difficulties would be increased on the shipping floor.

A. Well, if we attempted to operate efficiently at all, the shipping flour would, of course, still try to build up truckloads, which would be very difficult under the circumstances described. It would increase their costs considerably, although I would not at this time state exactly how far that cost would go up.

Q. Would it tend to delay an urgent delay?

A. I would say that the situation at the depot would be such that we would be rather badly confused. The condition would be somewhat chaotic and it would result in delays quite definitely.

Q. Can you think of any other way in which the application of this State statute and regulation to government intrastate shipments would increase the administrative burden and load involved in the discharge of your duties?

A. Well, I should say that the increase in paper work would go all the way up the line. There are more pieces of paper, more bills of lading, more shipping documents, and all the way up to finance and general accounting office, there would be additional paper work as a result.

Q. Do you contemplate any other difficulty attending this regulation?

A. I do not know just how it is contemplated that we will [fol. 598] negotiate for rates. When I say "we" I mean the Department of the Army as a whole, how we would negotiate for rates. I would assume it would require a series of officers in various localities to appear before the various state regulatory bodies. Of course, it would seem to me that they would impose a considerable burden upon the installations themselves asking for supporting data and testimony. I am not very well equipped at my place. We are strictly an operations office, not a statistical office, and I could not spare the time at the moment for too much of that.

Q. Colonel Hall, in your dealings from time to time, have you had to arrange for transportation of materiel that involves an element of secrecy from the standpoint of military security?

A. I have.

Q. Will you give brief illustrations of some such situation?

A. Well, of course, there are a great many security items moving at the present time, ordnance equipment of various kinds, electronic equipment, chemicals. We get into some interesting problems once in a while. I have had a few occasions in respect to certain movements that take place

where the transportation people will be required to provide the FBI with several alternate routes, not necessarily a legitimate tariff route, but possible routes that can be [fol. 599] used. The transportation office at the installation will have no idea what route will be used. In fact, even the truck driver does not know what route will be used until the FBI man gets into the cab with him. We have situations of that nature.

At Sharpe we do not ship commodities which are necessarily security items in the normal sense, although if I could just point out that really over a period of time every military shipment is in a sense a security shipment. I had some experience in Europe in that situation. A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments—shoes, medical supplies and food. Actually, a month's record of shipments to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination.

Q. As a matter of fact, do you know whether the European espionage agents use that source of study?

A. I had one graphic example of it. As a result, in Europe we bill all of our shipments merely as military property. As a matter of fact, that is the practice in Europe. Shipments for the Army and Navy are military property. That is the general practice.

Q. How many of these security shipments would you [fol. 600] say take place from day to day in this West Coast area? If you do not know, do not answer.

A. No, I would rather not make a guess at that. It would be purely a guess.

Q. Colonel Hall, do you think it would be possible to reveal the necessary data for logical and reasonable rate approval purposes in connection with many of these shipments which are secret in nature?

A. No, I do not think it would be possible.

Q. Colonel Hall, do you envision in the 48 States, then, a set of requirements for the publication of various tariffs that cover movements from one place to another of certain

materiel that foreign espionage agents might study those things and develop certain information which would be inimical to our national security?

A. Well, it could be done. If everything is to be made public, we might as well publish it in the newspapers. That is my own feeling on the subject.

Mr. McConnell: Take the witness.

Cross examination.

By Mr. Phelps:

Q. Colonel Hall, you do not think the California Public Utilities Commission would require the publication of all the records of carriers transporting secret government material, do you?

A. I do not know whether they would or not. They could [fol. 601] under the circumstances, I would say.

Q. You have no reason to think they would, have you?

A. No, I have not.

Q. I will ask you how a study of tariffs could help any enemy.

A. Tariffs? No, not necessarily.

Q. Didn't you say so in your direct?

A. No, I did not. I said a record of shipments.

Q. You have spoken of the use of certain kind of rate which you have called freight archives or f.a.k. rate. If I understand your testimony correctly, you have testified in substance the government finds it very convenient to use that f.a.k. rate. That is a fast summary of what you said, a part of it.

A. That is correct.

Q. And it is convenient because you frequently have shipments that are made up of a number of different kinds of items, is that right?

A. Correct.

Q. This f.a.k. rate, so called, in effect is a quotation in cents per hundred pounds for all the items in that shipment, is it not?

A. That is right.

Q. So that the classification or the description of each

item is ignored and the total weight of the entire aggregate [fol. 602] lot is taken as the total weight for applying this cents per hundred pounds f.a.k. rate, is that right?

A. That is correct.

Q. Have you any reason to think that the California Public Utilities Commission, upon proper representations by the government and the carriers, or either one alone, would not be respective of the needs of the government and to representations that the use of this f.a.k. rate is convenient and would authorize it?

A. I really do not know what the Commission would do.

Q. You have no reason to think that the Commission would not authorize such a rate, have you, Colonel?

A. No, I have not.

[fol. 603] Q. Is it your understanding— What is your understanding of the California law that is the subject of this case, Colonel?

A. Well, very briefly, as it affects me in my present assignment and in my operation, at the moment if this restraining order were lifted at this moment, I would be thrown into using Cal.-PUC No. 2, as I understand it.

Q. What is your understanding of the restraining order that has been issued?

A. My understanding of that is that I don't have to use Cal.-PUC No. 2 at the moment, but I—(Answer not completed).

Q. But your understanding is that the instant the restraining order issued by this Court were dissolved, that immediately you would be required by California law to apply upon all of your government freight the rates appearing either in established rates or in the Commission's minimum rate orders; is that your understanding?

A. Roughly, that is it. I presume there are legal and technical aspects to it and that it would not be too unreasonable, but roughly that is the idea.

Q. You say "roughly." I would like to have your precise understanding of just what would be the effect upon your procedures of the lifting or the dissolution of this Court's restraining order.

A. Purely my opinion.

[fol. 604] Q. Well, what is it?

A. Well, I would say that we would probably have a short amount of notice; that if the restraining order were not in effect as of 11:00 o'clock this morning, that probably next Monday I would start using Cal.-PUC No. 2. That's my own thought on the matter.

Q. That you would be required by law to?

A. That is right.

Q. Have you told us now all of your understanding of the California law?

A. Yes.

Q. Then you are not aware, I take it, of the provision of the law that empowers the California Public Utilities Commission to authorize carriers to transport property for the United States at free or reduced rates?

A. I am aware of that, yes.

Q. If you are aware of that, Colonel, how can you be so certain that you would automatically be required to apply the minimum rates and established rates?

A. Well, perhaps I am just looking at the worst possible picture.

Q. I see.

A. I would say that could happen. That's what I said: it could happen.

Q. Now, you spoke of the commingling of goods at your [fol. 605] depot, goods that have originated at various points, some outside the State and some inside the State of California; and you have stated that it would be impossible, or virtually impossible, to segregate those items, or many of those items, with respect to the origin points.

And you said in substance, as I get your testimony, that for the purposes of state regulation you could not segregate them. Now, what reason do you have to think the state regulation would require you to segregate?

A. Well, as I understand that, the regulation, we would have to distinguish between inter- and intrastate traffic.

Q. Would you point to the provision of the California law that would require you to do that? I offer you the Public Utilities Code.

A. Without taking some time I couldn't, no.

Q. Could your counsel assist you? I would be glad to have your counsel assist you.

Mr. McConnell: I would be glad to assist, but the thing seems to me—I don't like to argue ..... affairs—never seen on land nor sea. This statute relates to intrastate commerce only, doesn't it?

Mr. Phelps: What's your opinion?

The Witness: I would say it is.

Mr. McConnell: Well, I would say it can't relate to anything but intrastate commerce. If that's the only thing [fol. 606] the statute can relate to, it necessarily follows that that man who determines whether or not the statute applies to him must determine whether or not his particular shipment is inter- or intrastate commerce. I wouldn't imagine that a posture of that sort would be written out in the statute.

Mr. Phelps: You are pointing to the statute in its entirety, I take it, counsel? And are you aware of the provision that empowers the Commission?

Mr. McConnell: I beg your pardon?

Mr. Phelps: Are you prepared to advise your witness of the provision of the statute which empowers the Commission to authorize carriers to transport property at free or reduced rates?

Mr. McConnell: Mr. Counsel, you bring out the California Code. I am here from North Carolina, trying to get the Code in one book. To examine this witness about what is the California Code seems to me to be a futile gesture.

Mr. Phelps: I shan't press it.

Q. Now, you spoke, Colonel, of the army's mission as being in part disaster relief?

A. Right.

Q. Is it your understanding that the California law that is the subject of this proceeding would require that for the purposes of relieving disaster, that carriers charge the United States government at tariff rates?

[fol. 607] A. No, that is not my understanding.

Q. What is your understanding?

A. My understanding is that at the time of the recent movements which took place—of course the restraining order was in effect at that time, I believe. It was after the 23rd of December—that the carriers could offer their services free if they desired.

Q. Is it your understanding that California law, Section 530 of the Public Utilities Code, if it should become effective and if this Court's restraining order should be dissolved and the Section 530 of the Code should remain in effect, is it your understanding that carriers could transport property for disaster relief at free or reduced rates?

A. I would say that they could, that they could be so allowed.

Q. So the statute would not interfere whatever with the Army's mission in relieving disaster, would it?

A. I don't know if it would or not. It may.

Q. How?

A. Well, we can't presuppose what attitude the Commission would take on such matters. I can't.

Judge Carter: Mr. Phelps, I would like to ask the witness a question.

Mr. Phelps: Yes, Your Honor.

Judge Carter: Mr. McConnell asked you about what [fol. 608] functions at Sharpe Depot you performed aside from the military and you mentioned disaster relief of certain kinds.

Do you perform non-military functions such as, oh,—or do you supply non-military functions of the United States Army such as civil functions that the Corps of Engineers performs?

A. Yes, sir, we do. That is right, Your Honor.

Judge Carter: And do you at times supply other governmental agencies like General Services Administration or something of that sort?

A. Generally, in connection with General Services, the flow is in the other direction, supplies from GSA to the Army. I don't know that we have ever supplied GSA.

Judge Carter: Now, these civil functions such as the Corps of Engineers performs in the flood control field, are basically non-military functions, are they not?

A. In the normal sense of the word "military," that is right, Your Honor.

Judge Carter: And they do need some supplies and things of that sort in the performing of those functions?

A. Specifically, we supply heavy equipment, earth moving equipment, tractors, bulldozers, as well as clothing that would be used in such work—boots, heavy protective clothing.

Judge Carter: Thank you.

[fol. 609] Mr. Phelps: Is that all, Your Honor?

Judge Carter: Yes, that is all.

By Mr. Phelps:

Q. Now, Colonel, you spoke as one of your examples of the movement of some ammunition boxes, and you described how that was an urgent move, how you phoned the Chief of Transportation. That is the Washington office, I take it?

A. Correct.

Q. And that in a matter of hours you had your clearance, you had your rates, your routes and your interchange points; is that right?

A. Correct.

Q. You didn't really have your rates, did you, Colonel?

A. In that case I believe we did. We had the rate, all purely verbal, but to be confirmed.

Q. What was the rate?

A. I can't recall offhand.

Q. Well, normally you are not concerned with the rate under those circumstances, are you?

A. Every shipping transport officer is very much concerned with the rate. At Sharpe General Depot I am procuring officer, and I am subject to all the procurement regulations that every other procuring officer is. Mainly, I can't spend the taxpayers' money unless I know how much I am going to spend.

[fol. 610] Q. I mean for this type of movement, Colonel, where you have to get your clearance from Washington, get your routings from Washington, the rate is the concern of those people, is it not, and not you?

A. The amount of the rate is my concern as a shipping transportation officer.

Q. Well, do I understand that if you thought a rate was too high you would take some other course?

A. No. No, I would not, other than referring a movement

itself. I don't know; at my level, if the rate is too high or is too low, I have no knowledge. I have only a general interest in the subject. That is a matter for consideration by the Chief of Transportation. If a large movement is in prospect, we merely refer the matter to the Chief of Transportation where the decision and investigation and decision is made which will determine whether there should be any further processing to conduct negotiations.

They don't— The office of Chief of Transportation does not take such action on every case that is referred to that office. That is not at my level. I have, as a shipping transportation officer, a definite interest in knowing how much the rate is going to be so I can commit the funds.

Judge Lemmon: Take the morning recess.

Mr. McConnell: May it please the Court, if I may make a request, General Lasher has important business back in [fol. 611] Washington and he also has an appointment out of the Sixth Army Headquarters; I wanted to know if he could be excused from the trial.

Judge Lemmon: No objection?

Mr. Phelps: I have no objection.

Judge Lemmon: Very well. That will be the order.

(Recess.)

By Mr. Phelps:

Q. Colonel, just before the recess, I think we were talking about this example involving ammunition boxes where you indicated that in a matter of hours you had from Washington your clearance and your rates and your routes and your interchange points. Does the fact that you got your clearance in a matter of hours suggest to you that a rate for that kind of movement had previously been negotiated?

A. No, it does not. There had never been a previous movement in this case.

Q. Now, let's, still using that as an example, I will ask you how regulation by the State of California as contemplated by the statute in question would interfere with that kind of operation that you just described.

A. Well, it would interfere, as I see it, to this extent: that now the office of the Chief of Transportation can go direct to a competent carrier, or group of carriers, and explain the situation and whatever dealings are made are [fol. 612] done very rapidly and easily direct with the carriers. As I see it, in such a case as this, we would be going through the State Commission and we would not, in such case, necessarily deal directly with the carrier.

Q. Is it your understanding that the California law would make it absolutely imperative that you come to the Commission before making that move?

A. It could require that, yes.

Q. Well, now, let's see if we can be a little more precise. I want to know whether or not you believe the California law would leave you with no alternative whatever but to require to come before the Commission and get its authority before you could move those ammunition boxes.

A. Frankly, I don't know what the Commission would do. It would be purely my opinion. The answer would be yes.

Q. You have no alternative then?

A. That is my opinion.

Q. All right. Now, you said in describing military transportation that there was a need for flexibility, and you described how, if you were overseas, you would have under your command a fleet of vehicles under your absolute control and you could dispatch them and use them as you saw fit.

A. Correct.

Q. Now, if you were overseas that presupposes that the United States is in a state of war, doesn't it?

[fol. 613] A. Not necessarily, no.

Q. Isn't that what you had in mind when you expressed that opinion?

A. No, I did not.

Q. Now, you spoke of the f.a.k. rate. I would like to come back to that a little bit. You gave as an example a requisition from Fort Ord, a request for supplies for a division; you described how that goes to stock control and papers were prepared and go to transportation and you suggested that on an average there might be fifty different items making up a single consolidated shipment.

Now, at the present time—I am speaking now of your present practice and your practice apart from any regulation—what does the bill of lading show? Strike that and let me ask you this question:

Who prepares the bill of lading?

A. That is prepared at the depot in the transportation division which, in the case of Sharpe, is my office.

Q. I see. Now, what does it show in this move on this requisition from Fort Ord that you gave as an example with the fifty items?

A. The bill of lading itself merely shows a certain number of pieces of freight, all kinds, and the weight.

Q. Shows just the number of pieces?

A. The number of pieces.

[fol. 614] Q. Does it identify the number of pieces?

A. The pieces are not identified on the bill of lading itself.

Q. They are not classified, that is to say, they are not described in terms of a commodity description on the bill of lading, then; is that right?

A. No, that is correct; they are not.

Q. You're certain of that, Colonel?

A. I am certain of that. Now, to make this completely correct, we do—we are speaking of freight all kinds rates when we are using a freight all kinds item. We do describe shipments where you have no freight all kinds items; we do describe the shipment correctly according to proper commercial procedures.

Q. I am thinking now of the freight all kinds move where you got a mixed shipment of, let's say, fifty items; I should like to know whether or not in practice for that type of move the bill of lading, as prepared in your office, lists those items.

A. The bill of lading itself does not. If you are getting into the other documentation that frequently accompanies a bill of lading, you will find the items listed upon occasion. If is not required, and we do not necessarily, on those other documents, use the proper shipping classification descriptions.

[fol. 615] To get back to the requisition, as the result of the requisition, a document is prepared, which is known

as the army shipping document, which is the means that the Army uses to transfer accountability from one installation to another installation.

Q. Let me interrupt you, Colonel, if I may. You are not answering my question, which was directed solely to bills of lading. Let us be clear about this. As I understand it now, you have testified that in practice this type of move we are describing, an example of which is this move from Fort Ord, in practice the bill of lading does not show a list of the items making up the shipment?

A. This list that I am referring to, the army shipping document at times accompanies as a series of continuation sheets and can accompany the bill of lading. The point is it does not always, nor is it required under the present arrangements. Some installations do itemize and others never do.

Q. When this bill has been prepared and it shows a large number of items that are being consolidated in one shipment, it is contemplated, as I understand it, that you are going to get this freight all-kinds rate, which is the rate for the tonnage of the entire lot; that is right, isn't it?

A. Right.

Q. Have you any concern with whether or not the results [fol. 616] of the charge which the government will pay under that procedure will be greater than it might have been had you listed the items separately and rated each one separately?

A. I would be concerned, yes, if such a situation could arise.

Q. I take it, then, that in some way or other your present practice, your records are such and your practice is such that in some way you are unable to compare the charge which will result from the f.a.k. quotation as compared with the total charge that would result from rating each item separately, is that right?

A. We find very frequent comparisons of that nature are made, correct.

Q. So, as I understand it, this f.a.k. quotation does not relieve you of the necessity or the desirability of keeping an accurate record of the kinds of items and the classifications of the items and of the rate that would be applied to

each individual item that goes into the shipment; isn't that right?

A. Not on an individual shipment basis, no. Studies are made from time to time to keep current, rate studies at installations—to be specific, the Fourth Zone—to determine the overall level of rates. Studies are made sufficiently enough to know that it is advantageous to the government to take advantage of the freight all-kinds rate, not only [fol. 617] from the rate level standpoint but for the simplicity of the operation.

Q. Isn't it true, Colonel, that for every one of your f.a.k. shipments you know the f.a.k. total charge and you know also the total charge that would follow if you rated each one separately?

A. No, I do not.

Q. But someone in your organization does?

A. Could find out if they so desired.

Q. Isn't there someone in your organization that is required to know that?

A. No. When I said they are not, I meant my organization here at Sharpe General Depot. My organization here at Sharpe General Depot does not know that.

Q. How about your superiors? How about the regional office, Region Four?

A. At the zone office, I can tell you there, my experience at the zone office, that the zone does not check out the individual shipments. They maintain a general study, which is more or less continuing. They know the items that Sharpe General Depot is shipping and other depots are shipping. Frequent studies are made to insure that the general level of the freight all-kinds rate is below what the less than truckload class rates would be.

Q. Now, you spoke of the congestion on the shipping [fol. 618] floor under the regulation. Will you tell us a little more what you mean by that? What will cause this congestion on the shipping floor under the regulation?

A. That, of course, is partly conjecture, but if we—it is merely a matter that if the depot must ship in less than truckload quantities, which I presume we would be doing, it would result in an increase in the number of bills of lading and the space required for preparing our shipments.

We assemble these shipments on the shipping floor in shipment lots. They are brought in from the various 49 warehouses that we have or from open storage. They are brought into a central location for shipping and they are consolidated into a shipment covered by one bill of lading. If we had more shipments we would have to have more separate little piles of individual pieces of freight.

Q. Do I understand, then, Colonel, that these fears which you have expressed, this chaos that is going to follow, this confusion that is going to appear, in your opinion, is all predicated upon your assumption that you will be unable under the regulation to ship in truckload lots?

A. That is, our small shipments, other than our truckload rates. Where we are now using all-kinds freight rates, we would have turned to shipping in less than truckload lots at the moment.

Q. "At the moment"—what do you mean by that?

[fol. 619] A. As previously stated, if the restraining order were lifted as of this moment, I would presume within a few days we would have to use PUC No. 2.

Q. And you expect, and it is your opinion that as of that moment you would no longer be allowed under California law to consolidate a mixed shipment into truckload lots; is that your understanding?

A. At this time we would not be allowed to, no. Whether we would be granted that authority or not, I do not know.

Q. At this time, you mean, in the present state of the California law?

A. With the restraining order in effect as it is as of this shipment consolidated into truckload shipments.

Q. Let us suppose that the restraining order has been lifted. Let us suppose that the California law becomes operative in its entirety without any restrictions. Is it your understanding that as of that moment you would no longer be allowed by California law to consolidate less than truckload items into truckload lots?

A. Such arrangements are not now in effect, to the best of my knowledge.

Q. Could you answer my question? Will you read the question?

(Question read.)

Q. What is your understanding?

A. I would say yes.

[fol. 620] Q. You would no longer be allowed to consolidate?

A. I would no longer be able to.

Q. And that is your opinion. Do I understand, Colonel—you correct if I am wrong in my understanding—do I understand that you presently do not have available for the examination of the Court and others interested any summary, summaries showing the types of commodities that are shipped by the United States between points in California or as representatives of the type?

A. I do not have any summaries of commodities, no. I have tonnage figures which are strictly bulk tonnage figures.

Q. In what form do you have those figures?

A. They are tonnage figures showing the tonnage by rail, by truck, received and shipped from the depot.

Q. Of all kinds of commodities or is it broken down?

A. All kinds, without regard to type or without regard to origin.

Q. But you do not have any data or summaries presently available showing the types of commodities that are shipped?

A. No, I have no reference to bills of lading showing government shipments.

Q. Do you have any data before you or available to you or have you prepared any summaries that will show the various points of origin and the points of destination?

A. No, I have not.

[fol. 622] Q. Were you asked to prepare any such data as that for the purpose of this hearing?

A. I was not.

Q. Now, you spoke of subsistence type items. What do you mean by that, Colonel? I think we all have a general idea, but will you tell us what you mean by the word "subsistence" type items?

A. That is generally commonly known as food.

Q. Have you any figures that will show the total tonnage moved between points in California of subsistence or food items?

A. No, I do not have the figures.

Q. Can you tell us, Colonel, from what points in California do you receive shipments at Sharpe; that is to say, can you tell us points of origin in California from which flow from time to time shipments into Sharpe?

A. Yes. It would be a very lengthy list. Primarily we receive canned goods. That will come from many of the producing areas in the state of California, of which there are many—that is, San Jose, Santa Clara, any point in the San Joaquin Valley, Modesto, Fresno are among the principal points of production.

Q. You say it would be a lengthy list?

A. Yes. Any cannery in the state of California eventually will ship to Sharpe.

[fol. 622] Q. Can you tell us in a similar form or words the points in California to which shipments move out of Sharpe?

A. They will go to any point, military installation within the state of California. I believe there are a total of 153—I believe that is correct—army installations within the state of California.

Q. Can you tell this Court, Colonel, where are located the principal canneries in California?

A. Well, I already mentioned San Jose and Santa Clara, which are very, very heavy producing areas. Stockton and Tracy are very near the depot. And we also receive heavily from both Stockton and Tracy. Modesto, Fresno are producing areas.

Q. All those places you have named so far are located upon major highways in California, are they not?

A. Generally they do come from near a major highway.

Judge Carter: What about the tuna from San Pedro and San Diego?

A. We do get, sir, canned fish from other points also. Primarily the canned fruit and vegetables are what we receive.

Judge Carter: Yes, but when you talk about the canning business in California you run from fish to nuts.

A. Yes. It is so widespread; it is just every place in the state, practically, except the lumber area.

By Mr. Phelps:

Q. Now, one more question, Colonel: Isn't it true that the great majority of these military establishments to which [fol. 623] you ship from Sharpe are located on or near major highways?

A. A large portion of them are near a major highway.

Mr. Phelps: No further questions.

Judge Lemmon: Any redirect examination?

Redirect examination.

By Mr. McConnell:

Q. Colonel Hall, if we may go back to the requisitions from Fort Ord to the depot for supplies and equipment for a division, are requisitions of that type made periodically?

A. Some of the supply is automatic. I believe that has been touched upon in previous testimony. You just have so many troops, you automatically supply a certain number of items. You know how much they are going to eat, how fast they wear out shoes, and that is more or less automatic, and it's shipped out based on our knowledge of those requirements.

Other supplies are requisitioned. Different installations will have a different system. It is different among the services. But, generally speaking, there is a cycle on which requisitions will be received at the depot.

Q. In the event that it was planned that that division was to make an expedition of some sort, might you receive a large requisition for what is known as reserve equipment for a division or expedition?

[fol. 624] A. Well, that is correct. We have entered into that in furnishing some of the supplies. I imagine this is what you have in mind, this Arctic expedition that is in the Arctic at the moment. We furnished winter clothing, for example, for a unit of troops which gathered at one installation, and Sharpe furnished the articles of clothing for that particular expedition.

Q. Is it conceivable one of those requisitions coming from a division which has planned an expedition or operation of some sort might request literally thousands of items?

A. Yes, it is possible.

Q. About how many items does a division use as part of its organic and individual equipment?

A. That is a very difficult statement to answer since I have never been a supply officer with a division. I stated, and I can only repeat, that from Sharpe they could get 51,800 items.

Q. It's conceivable that at times a requisition might request 100,000 items, is it not?

A. Well, the total requisition would. Anything that we didn't have at Sharpe would be extracted back to another depot that did have the material.

Q. Well, let's assume that you had from the division at Ord a large requisition for a 90 day replacement for an expedition requesting over 100,000 items——

[fol. 625] A. Yes.

Q. Take that requisition from the time you receive it, and we don't want to be repetitious, but how would you go about filling that?

A. Well, the first thing, I will have to repeat that the requisitions are received in the stock control division, which is just what the name implies. The stock control division in each installation knows just where and how much of every item of stock you have in the depot, whether it's a fanbelt, a spark plug or a nut and bolt or a tractor. You know where you can lay your hands on it.

Stock control prepares this army shipping document, one copy of which immediately comes to transportation, and that will have all the items that are listed on there for billing purposes.

Those items will be listed with the army nomenclature, not the shipping nomenclature as commercially known. In fact, with such items the nomenclature is purely a numerical designation.

Q. Now, when you make your study of the items on a requisition that are in your depot and you must ship, towards what end is your study directed in the transportation office?

A. Well, just one end, and that is efficient transportation, satisfy the military requirements at the lowest cost.

[fol. 626] Q. When you speak of efficient transportation,

what are some of the factors that you would consider in that connection?

A. Well, that includes not only the rate itself, but you also include your packing requirements, your cost of handling, one mode of transportation as compared to another mode of transportation. I mentioned the different packing requirements of one mode of transportation v. another mode.

Q. As far as the utilization of carriers, what is one of the factors you consider?

A. We try to get full utilization of each piece of equipment, whether it be a rail boxcar or a van; we try to.

Q. Try to get the maximum load?

A. Right.

Q. Therefore you must analyze and put certain items with certain other items, must you not, in your arrangements?

A. That is correct. In trying to work out a full truckload lot of mixed items, it is very difficult. It puts some burden, requires a little brain work and a little skill in trying to adjust your load to get a satisfactory load that will meet the state restrictions as to height, width and weight, keep yourself within the load limits, and at the same time make an economical shipment out of the thing—economical from our standpoint and from the carrier's standpoint.

[fol. 627] Q. Now, when your analysis is made of the most economical mode of loading, and so forth, of the shipments in any particular movement, do you have communication with the shipping section?

A. Right. We send back to the shipping section our loading plan, and they in turn follow our loading plan and make the shipment.

Q. Now, in the absence of this restraining order which is now in existence—I mean— Strike that, please.

Under the practice that has heretofore existed in California, you can perform that function under the freight all-kind arrangement that you make in normal hauling procedure, can you not?

A. That is correct. It is fairly simple from a rate standpoint now.

[fol. 628] Q. And the only considerations that you have in the segregation in making up your loads are the most economical use of transportation to accomplish the job, is that correct?

A. That is correct.

Q. Now, supposing this restraining order were lifted, what regulation would come into effect?

A. At the moment PUC No. 2 is the minimum class rate scale.

Q. That is a class rate, is it not?

A. There are a few commodity rates quoted in it; very, very few.

Q. Now, what is the problem that you might have in connection with loading and segregation when you were shipping under a class rate?

A. As I pointed out, I am now segregating for operating reasons to try and get good satisfactory loads in a truck or in a car. If I were operating under L.T.L. class rates, I'd be segregating again to try and get compatible items together.

Q. Suppose you were trying to make a complete economical truckload under the class rates. What would you have to do?

A. Well, we would, say we would try and get like items together, all of our fourth class items together and try to make enough for a truckload.

[fol. 629] Q. What do you mean by fourth class items?

A. Well, items that would be rated at one of the class rates: first class, second class, third class or fourth class.

Q. Suppose you describe what the difference in the rates is in the class rates between the fourth—the first class and the fourth class rates.

A. Well, there is, of course, considerable difference. The first class rate is your higher rate, graduates down to second, third and fourth. They are all percentages of the first class rate, generally speaking.

Q. What is an item that might be called first class?

A. Oh, first class rate would apply to a good many of our clothing items, and utensils of various kinds that we ship considerably of. We have various aluminum articles, and that sort of thing.

Q. If a car or vehicle were loaded with the mass of materials, some commodities of which fell in the fourth class rate and some which fell in the first class rate, which rate would that carload take?

A. Frankly, at the moment, it is a bit confused and I don't know. I would say that we would rate everything in that truckload at the weight of each shipment at the applicable rate.

Q. I am talking about under class rate. If you have a high item in one compartment, doesn't that item set the rate [fol. 630] under railroad procedure?

A. Under PUC No. 2 I don't know just what mixing rule would apply.

Q. You do have the problem of mixing items in the same class with items in the other class, do you?

A. That is correct.

Q. So in your operations on the shipping platform you would have an additional requirement for segregation and boxing, would you not?

A. That's correct.

Q. Would that be burdensome if you applied them to the class rates to try to get full truckloads?

A. I would say that it would be very burdensome.

Q. Colonel Hall, are you familiar with any studies that have been made recently of patterns of military traffic?

A. We—I haven't made any recently. I know when I was at the Fourth Zone, to try and simplify our work at the Zone, I tried to see if we couldn't group our movements. At the Fourth Zone as a whole we had a bare, slightly under 40 per cent that would fit into any definite pattern.

Q. From your study of the entire Fourth Zone just 40 per cent of military traffic would fit into a pattern?

A. That was right; that was a year ago.

Q. About what percentage of commercial traffic, from your experience in that connection, fits into a pattern? [fol. 631] A. Well, I would guess that it would be at least twice as much. I would say about 80 per cent. That is a matter of opinion.

Q. Colonel Hall, can you think of any ways in which this regulation by the State Commission might prejudice any carriers or groups of carriers in the State of California?

Mr. Phelps: Just a moment.

Mr. McConnell: I think that would be enlightening to Your Honors; I think you would like to know.

Mr. Phelps: It might be of academic interest, but I don't see just how it is relevant to the question of interference with the United States government.

Mr. McConnell: Of course,——

Mr. Phelps: Just a moment, please.

Mr. McConnell: Excuse me.

Mr. Phelps: Even if the regulation, which I think is not the fact, even if it should be burdensome upon carriers, I don't see how that is relevant as to whether or not it is burdensome on the United States government.

Mr. McConnell: May I? As we conceive a constitutional doctrine as set out, you always have to balance the local against the national interests. That is a burden here; there is no doubt. Just as in the famous case that came up here, that involves balance of interstate commerce, which is under national regulation, with the local interests here: [fol. 632] There, as Justice Stone said, you can never resolve the thing by ————, but you must try to show what good this does for the State as a whole and balance with whether it interferes with the national function. It has been our thesis that this thing causes a terrific burden and disrupts the supply lines of the United States and seriously threatens the country at large, and when you examine it, we say that it might possibly help a few, 15, 20 or 30 carriers in the state to get more money in their pockets, but for the citizens as a whole, it is our contention if you examine the operation of this thing that it would be detrimental to them.

Judge Lemmon: Objection sustained.

By Mr. McConnell:

Q. Colonel Hall, do you frequently use transit privileges at Hall General Depot?

Judge Carter: Sharpe.

Mr. McConnell: Excuse me, sir.

Q. Sharpe.

A. Giving it to me. Yes, all of our rail shipments are

registered for transit. That's a definite rule, that every rail shipment is registered for transit.

Q. And will you explain "transit" just roughly, as it is used in transportation circles?

A. Well, the shipment of any commodity moves from point of origin into a storage point. At that point you take [fol. 633] a copy of the freight bill and give it back to the railroad and say in effect, "We are going to store this here for a few months and we'll ship it out later." And it moves eventually at the rate from the original point of origin to the final destination through the transit point.

Q. It is commonly recognized as a through rate, is treated as interstate rate?

A. Yes, if the shipment was originated without the State and—that's correct.

Q. Do truck companies usually have transit arrangements?

A. Not generally; there are a few, but I believe none in the State of California.

Q. Would there be a general tendency on the part of the persons charged with the operation of the various depots to utilize these transit arrangements if there was a differential in rate between the intrastate rate and the interstate rate?

A. Well, there definitely would. The preponderance of traffic at Sharpe arrives by rail. I do have specific figures on that. In fact, the ratio is 25 to 11, based upon the receipts for the past two years. The receipts were—are 25 tons by rail to 11 by truck. All of that rail tonnage is registered for transit.

The outbound movements are 13 tons by rail to 15 by truck, so you can see that we have a large amount of transit [fol. 634] that comes into the depot which we could apply this transit, make shipment in interstate shipment. Instead, we send it out, forward by truck.

Q. Colonel Sharpe, are you familiar with the military installations——

Judge Carter: You mean Colonel Hall, don't you?

Mr. McConnell: Colonel Hall; excuse me.

Q. —the Sierra Ordnance Depot at Honey Lake?

A. Sierra Ordnance Depot at Hurlong, California.

Q. Hurlong, California.

A. All right.

Q. What is the primary function of that installation there?

A. A receipt, st-rage and issue of high explosive ammunition.

Q. Is it one of the large ammunition storage points in the world?

A. It is one of the large ones, right.

Q. What points are supplied from Sierra in California?

A. They ship explosives to all points in the State of California, all military installations, Army, Navy and Air Force as well. Port Chicago—the export movements go through Port Chicago, which is the Navy facility near Oakland; Fort Ord, Camp Irwin are heavy receivers.

Q. About how far is the Sierra installation from the Nevada line?

[fol. 635] A. Very close. Some air lines, I believe about 20 miles from the Nevada line; 60 miles from Reno.

Q. You are familiar with the routings and so forth from Sierra?

A. Fairly familiar, yes.

Q. Could you state whether or not in serving some of these important installations in the southern part of California they might use an alternative route which crossed over the Nevada line and went down into California?

A. Yes, Sierra is in a peculiar situation in that respect in that one railroad can come out only on an intrastate route; the other railroad can come out of Sierra only on an interstate route. S.P. has to go back through Reno, Western Pacific comes straight out, and the same thing applies to trucks.

Q. How about the highways running south into California?

A. You can use—you can make shipments either by an intrastate route within the State of California, or you have another route, along with rates to Southern California, that goes through Nevada.

Q. If the rate scale became particularly burdensome in

the State of California, wouldn't it be logical to route shipments of that ammunition intersfate?

A. It would be done that way.

Judge Lemmon: Recess until 2:00 o'clock.

(Whereupon an adjournment was taken to 2:00 o'clock p.m.)

[fol. 636] TUESDAY AFTERNOON SESSION, MARCH 20, 1955, 2:00

GEORGE A. HALL resumed the stand; previously sworn.

Redirect examination (Continued).

Mr. McConnell: May I have this list marked for identification as Government's Exhibit 1?

(List referred to was thereupon marked Government's Exhibit No. 1 for identification.)

By Mr. McConnell:

Q. Colonel Hall, I will show you a list of the names of military installations marked as Plaintiff's Exhibit No. 1 and ask you if this is a list of the Army installations in California.

A. This is a list of Army installations in California and would appear to be all-inclusive.

Q. Colonel Hall, you stated before the recess that you were familiar with the operations at the Sierra Ordnance Depot, is that correct?

A. Fairly familiar, yes.

Q. Are shipments of ammunition made from the Sierra Depot to the Fallbrook Naval Ammunition Magazine down at Pendleton?

A. Yes, there are shipments of ammunition from Sierra to Fallbrook.

Q. Are such shipments made to Fort Ord?

A. Yes, that is correct.

[fol. 637] Q. Are such shipments made to Moffett Field?

A. That is correct.

Q. Colonel Hall, do you from Sharpe make shipments to the Presidio in San Francisco?

A. Yes, we do, the Presidio, San Francisco.

Mr. McConnell: I have no further questions.

Recross examination.

By Mr. Phelps:

Q. Colonel Hall, you stated that all rail track into Sharpe Depot is registered for transit, did you not?

A. That is true.

Q. I should like to ask you one or two questions about your present transit system, that is to say, how the transit privileges presently enjoyed by the United States Government; is it not true that whenever a shipment comes in by rail you have indicated that you registered that for transit.

A. Yes.

Q. Now, the word "registering" means, does it not, that a document is filed at the transit point, which is Sharpe Depot, showing the commodity, the tonnage and the point of origin of that shipment?

A. That is correct.

Q. When you were considering an outbound shipment, and the question is whether that outbound movement may enjoy that transit privilege, don't you have to know whether [fol. 638] or not there is in the transit point, in the transit house, which is Sharpe Depot, enough registered tonnage to permit that outbound movement?

A. We have to know if there is enough, yes, that is correct.

Q. And at any given time the records which you presently got, tell you the precise point of origin of your registered tonnage, do they not?

A. That is correct.

Q. And at any given time you could consult your transit records and you could determine how much tonnage was presently in the depot that was registered for transit, could you not?

A. That is correct.

Mr. Phelps: No further questions.

Mr. McConnell: May it please the Court, may I jus explore one more aspect?

Judge Lemmon: Judge Carter suggests that the Cour make an inquiry of the attorney for the plaintiff as t whether this plaintiff's Exhibit 1 is to be offered in evidenc or just remain identified.

Mr. McConnell: If the Court please, as we stated at th outset, we tried to get some area of agreement with respec to the exclusive nature of the jurisdiction of the installa tions. This list was prepared by the Corps of Engineers [fol. 639] It has on one side a short statement of what i exclusive jurisdiction and what is not. However, as we have discussed the thing, there are quite a few disputed areas in connection with the exclusive jurisdiction. Ac cordingly, we just identify the list of installations and a a later date, when we have our real estate expert, we wil introduce it, when he is able to explain just what the Corp of Engineers meant by these notations on the side.

Q. Colonel Hall, in your military transportation experi ence, do you know situations in which materiel moves int depot with transit privileges and is mixed with materia which is moved in there and does not have transit privi leges?

A. That is our general practice at Sharpe. There is n particular point in segregating. It is not necessary.

Q. Taking your knowledge of the installation at Sierra isn't it true that a lot of ammunition moves with transi privileges and some ammunition moves without transi privileges, isn't that correct?

A. That would be true.

Q. If the ammunition is similar in nature, would you tr to keep it segregated or would you put it in the same igloos

A. With explosives, of course, you have a separate prob lem. That is segregated by type. Your safety factor i taken into consideration. But generally your light typ ammunition will be stored together.

[fol. 640] Q. For example, you have a reserve of 15 millimeter shells. All 155 millimeter shells would be pu in the same——

A. The same igloo area.

Q. The same igloo area?

A. That is correct.

Q. And they would be mixed indiscriminately as far as one having transit privileges and the other not having transit privileges?

A. That is right.

Q. When you make an outbound shipment from that igloo area, is any effort made to determine whether or not the particular shipment is still under the transit privileges or not?

A. There is no effort made to know if this particular shell was one that came in on this particular inbound or shipment, if that is the question. One given item is not necessarily the same one that came in on the shipment which was registered for transit which you are drawing against.

Q. In other words, the mass of shells—you treat the mass of shells as fungible just as an elevator would treat feet; is that not so?

A. That is correct.

Q. And you do not have a record of the general level of ammunition with transit privileges, is that correct?

[fol. 641] A. That is correct. But there is no requirement to segregate as to point of origin.

Q. If it were required that you would have to segregate similar type- of ammunition that did not have the transit privilege from ammunition which did have a transit privilege, would that be a burdensome chore?

A. It would, particularly on explosives. It is rather difficult to store explosives, to begin with, and to further segregate would be quite a problem.

Mr. McConnell: I have no further questions.

(Witness excused.)

Mr. McConnell: May it please the Court, at this time we would like to call Mr. Pistor, who is a witness from Texas, and who is on a rather tight schedule. I might say Mr. Pistor is considered one of the best experts on the shipment of military freight. The Attorney General was prepared to write him a letter and request him to give the

advantage of his testimony in this proceeding as a general expert. Before the letter was sent, Mr. Pistor had been advised and said that he would come voluntarily, both on account of his interest in the proceedings in his own case, and because of his general views about the matter which he entertains as a citizen. Mr. Pistor.

[fol. 642] C. H. PISTOR called as a witness on behalf of plaintiff; sworn.

The Clerk: Please state your name and occupation for the record and for the Court.

A. My name is C. H. Pistor—P-i-s-t-o-r.

The Clerk: And your occupation?

A. I am general freight traffic manager of the Texas & Pacific Railway at Dallas, Texas.

Direct examination.

By Mr. McConnell:

Q. Mr. Pistor, will you describe the location of the lines of the Texas & Pacific Railroad?

A. The Texas & Pacific Railroad is a federally chartered railroad operating from New Orleans, Louisiana on the east and Texarkana on the east across the states of Louisiana and Texas to El Paso. It forms a part of the southern transcontinental rail route along the 32nd parallel of latitude.

Q. Will you briefly explain to the Court the duties of your present office as traffic manager of the Texas & Pacific Railroad?

A. My principal duties are the making of freight rates, the handling of matters before the Interstate Commerce Commission and the various state regulatory bodies, the solicitation of freight, the division of revenues between the carriers; in short, all matters in general that pertain to the making of rates, rules and regulations governing trans-
[fol. 643] portation of freight traffic.

Q. Mr. Pistor, will you please state briefly your back-

ground and experience in general in railroad rate and traffic matters?

A. My railroad career began in 1917. I began with the Mobile & Ohio Railroad, which is now a part of the Gulf, Mobile & Ohio. I was with that carrier for seven years until 1924. Then I was with the Missouri-Kansas-Texas Lines, operating from St. Louis and Kansas City to the Gulf of Mexico at Houston and Galveston, until 1928.

In 1928 I went to Texas, joined the Texas & Pacific Railway, and I have been there since. I have been continuously employed in the traffic department of these several railways, and am generally familiar with the transportation of rail freight traffic and the rules and regulations that govern it.

Q. As part of your duties, have you had considerable to do with the solicitation and arrangement for transportation of government property and materiel, particularly military materiel?

A. Yes, I have.

Q. Could you elaborate on that a little bit?

A. In our department we deal not only with the making of rates on commercial traffic, but we regularly process what we call government rate quotations. We do that as a [fol. 644] matter of routine day in and day out. Not only I, but the members of my staff.

Q. Is there a considerable amount of that type of traffic in Texas?

A. Yes, sir; there is a lot of it. A good number of military installations of this country, I think something like ten per cent, are located in Texas.

We have a number of the very large ones on our railway. We have one at a point called Defense, Texas, which is in the northeast corner of the state about 12 or 15 miles west of Texarkana.

Q. There is a pointer, Mr. Pistor.

A. (Going to map on blackboard) I have to put my glasses on to see that.

This is Texarkana, which is at the state lines of the states of Texas and Arkansas. This depot that I am speaking of is located here, some 12 miles west of Texarkana. It is not only a storage depot for ammunition of all sorts, bombs,

TNT, explosives, cannon shells, everything of that description, but also a place for the storage and the repair of a lot of government military vehicles such as tanks, half-tracks, jeeps, vehicles of every type and description.

To give you some idea of the size and importance of that installation, I might say that it is served by two railroads, our railroad and the Cotton Belt; and it was activated [fol. 645] some time in the early '40's and we have handled up to now something over 200,000 cars into and out of the place. The traffic which the Cotton Belt handles would be substantially the same.

Q. Is that the Red River Arsenal?

A. Yes, sir.

Q. Is it true that that's one of the large arsenals in the world, if not the largest arsenal in the world?

A. I understand it is.

Q. Mr. Pistor, you have had occasion recently to make a study of the effect of state regulation of rates for the shipment of military materiel on the general problems of the transportation of such materiel, both from the standpoint of the government and the carriers with whom you are interested?

A. Yes, sir; I have.

Q. Will you explain to the Court the occasion for your study?

A. The study became necessary just recently in Texas. For many, many years, decades, as a matter of fact, we, the railroads, and I believe that's true of the common carrier motor lines, too, for that matter, have made what we term special rate quotations to the United States government.

Those quotations have always been applicable on either state or interstate traffic without regard to state lines at all. We have undertaken no segregation, and neither has [fol. 646] the government been required to make such segregation.

All of a sudden here just recently, within the last six months, certain truck lines, it appears, prevailed upon the Attorney General of Texas——

Q. (Interposing) Let's just state the bare facts of the thing.

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANT,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

A. Excuse me.

Q. And not the underlying——

A. You mean the reference to the truck lines?

Q. Well, the Attorney General's opinion.

A. The Attorney General issued an opinion counter to opinions rendered by previous attorney generals, this opinion holding, in substance, that the tender of special rates to the government would be subject to the approval of the Railroad Commission of Texas.

Under the Texas Rules no railroad company is allowed to file or establish a freight rate. It must be fixed by the Railroad Commission.

The import and effect of this ruling by the Attorney General was that we could no longer make quotations on what amounted to federal intrastate traffic without first seeking and securing the approval of the Railroad Commission.

When we analyzed and studied that proposition, we found that it would be unworkable.

Mr. Phelps: Just a moment. I think the witness' answer [fol. 647] has gone on beyond the scope of the question.

Judge Lemmon: Probably so.

By Mr. McConnell:

Q. Was an action brought—— After the ruling of the Attorney General did the State Commission of Texas take any action?

Mr. Phelps: Just a moment. I am going to object, Your Honors, to any further questions with respect to what has happened in Texas. It seems to me we are concerned and have our hands full with what is happening in California, not of any assistance to us and wholly immaterial for this witness or another witness to narrate the history of some litigation in Texas.

Mr. McConnell: Just trying to explain why the study was made. This regulation of intrastate rates for government materiel can not be put under a bell and isolated.

Judge Lemmon: Are these questions asked for the purpose of qualifying him as an expert?

Mr. McConnell: If the Court please, I thought it might be appropriate; I don't think the questions are absolutely essential. I thought it might be appropriate, as he testifies, to show his interest in the subject matter in general, and what his present——

Judge Lemmon: His study, of course, would go to his qualifications to give an opinion. If that's your purpose, I think it is quite proper.

[fol. 648] Mr. McConnell: Well, the purpose is to show the occasion for his study.

Judge Lemmon: The study would be quite proper. I don't know the occasion for the study would be.

Mr. McConnell: Well, we were just—I will not go any further into that aspect of the matter.

Q. But during November of the past year you did have occasion to make an extensive study of the effect of state regulation on intrastate rates for the shipment of government materiel; is that correct, sir?

A. Yes, sir; I was simply trying to say, perhaps in too broad a way, how it came about I made a study of this subject. We had this proposition rise in Texas and took the matter to court, and because of that circumstance I had to get into the subject.

Q. Do you have an opinion as to—as to the result of your study as to the effect of subjecting the federal government rate arrangements to the control of a state commission?

A. Yes, sir; I have.

Q. Do you have any opinion with respect to whether or not the present system, as you have observed it through the years, is efficient and an adequate one for the purposes?

A. The present system under which we have been working for these many years has proved very satisfactory.

[fol. 649] Mr. Phelps: Just a moment. Now, that is not responsive, Your Honors, and I object to the answer and ask that it be stricken as not responsive. The question was do you have an opinion.

Judge Lemmon: That is true.

The Witness: I have an opinion.

By Mr. McConnell:

Q. What is your opinion?

Mr. Phelps: Just a moment.
Judge Lemmon: Now, you can give your opinion.
Mr. Phelps: I beg your pardon?
Judge Lemmon: Have you an objection to this question?
Mr. Phelps: Yes, I do. I object to having the witness express that opinion.
Judge Lemmon: Overruled.
Mr. Phelps: Pardon?
Judge Lemmon: Overruled.

A. I believe you have two questions. First you wanted to know do I have an opinion about this subjecting it to state regulation, and then I believe you asked whether I have an opinion as to the work, let's say, or workableness of the present system; is that correct?

Mr. McConnell: That is correct. There was not a complete answer, I think, if I may recall you to the first question, so the second question may be stricken, and will you answer the first question?
[fol. 650] A. The first——
Judge Lemmon: You answered the first question. You have such an opinion?
The Witness: Yes, sir; I have an opinion.

By Mr. McConnell:

Q. What is the opinion?
A. My opinion is that subjecting the tender of these rate quotations to the jurisdiction of the several state commissions would very seriously impede and interfere with the normal flow of government traffic through these various depots and installations.
Q. Will you explain that, the basis for your opinion?
A. Yes, sir. I would like to use a term or two here that General Lasher used, briefly, and explain the use of them. I would like to refer to the term "class rates" which you heard something said about and "commodity rates."
As the General indicated, under our present statutes or requirements, we are obliged to make rates or publish rates

on all traffic, everything from anvils to zithers, if that is the A and Z of it; from and to every railroad station in the United States. We are obliged to establish rates on polar bear skins, if you please, from southern Florida to Wyoming; we need to have rates on citrus fruit from the wastes of North Dakota to Santa Ana, California; we need to publish rates on shoes from Dallas, Texas to every railroad station, every hamlet and town in the United [fol. 651] States, although we don't have a shoe factory in Dallas.

Now, we do that by means of classifying all commodities into a rough relatively few number of classes, and then publishing what are largely mileage scales of rates. So to determine a rate on any given article from here to there, we simply determine its class, the distance from origin to destination, and we have a rate.

Now, those rates manifestly are not tailor-made; they represent largely the reasonable maximum rate which traffic could bear, and not very much traffic moves under them.

The Interstate Commerce Commission in a recent investigation in the Southwest, termed Docket No. 28300, found that less than 4 per cent of the traffic moves under such class rates.

Conversely, we publish what we term commodity rates. Those are rates on given commodities from specific origins to specific destinations. They are designed to meet the needs of the traffic.

We, day in and day out, establish rates of that nature to foster and encourage and to develop the movement of commercial traffic.

We, as railroads, generally have opportunities to make those rates, to confer with industry before they are published. Very shortly the vice president of our company and I will go down to Belasco to talk to the Dow Chemical [fol. 652] people who are about to put a $25,000,000 plant on our line in Louisiana. We will learn from them what they will ship, where from and where to. By the time the plant is erected, they will be provided with suitable rates.

Now, we can't do that on this government materiel that we are concerned about. The traffic of the government that

we are concerned about is utterly different from this commercial business. In the first place, the commodities are different. We ship ammunition for cannon; we ship jet fuel; we ship parachutes; we ship tanks; we ship bombs; airplane engines. There's just no end to the commodities that we ship, and they are not the commodities that move in commercial channels.

The movement of government traffic does not follow a regular or rigid pattern as does commercial traffic. Commercial traffic moves largely from point of origin or production to large centers of consumption. Government traffic will move just the opposite. Sometimes it will move from a point like Defense I have mentioned to the port, maybe to make a ship; the next day it will move back again. We don't know why, but the movement is unpredictable and uncertain, and it moves suddenly. We don't have time to sit down and make rates through the normal processes that we use in making rates on commercial freight.

The routing of government traffic doesn't follow the [fol. 653] routing of commercial traffic. Just this past—within the past two weeks, I think it was, or certainly within the last 30 days, Colonel Flanagan asked us to provide for routing of ammunition from points beyond Kansas City and out of a depot at Parsons, Kansas, down through Defense here, then up through Memphis into the southeast. Normally commercial traffic would move that way, so we provide different and additional routes for the movement of government traffic, military traffic.

[fol. 654]. The packing of government traffic does not follow the requirements of commercial traffic. The mixture of government traffic does not follow the mixing of commercial traffic. Just recently we had some large maneuvers in Louisiana on our line around Alexandria, in the center of the state. There were upwards of 100,000 men involved on those maneuvers and the Government shipped trainloads of military impedimenta, supplies and troops from points like Fort Bragg into that area. It moved those things, packed them and shipped them without regard to the normal commercial regulations or the regulations that governed commercial shipments, and they were able to do that readily, quickly and without any problem because we made

Section 22 quotations on that traffic. We simply described the business as military impedimenta or things of that sort at a certain rate that was agreeable, and everything was handled in expeditious fashion.

Q. Do situations of that sort come up intrastate in Texas as well as interstate?

A. Yes, they do. These very maneuvers that I am now describing were first slated for points in Texas, and because of some problem in getting the required area for the troops to move put in, why, they were set for Louisiana. But many of these movements came, for instance, from Fort Hood, and the movement could just as easily have been from Fort Hood, Texas, near Waco in the center of the state, to some [fol. 655] other point in the state, as from Fort Hood to Louisana, where they did take place.

We reputedly also have movements in the State of Texas. We have movements from Fort Hood into Defense. Maybe we have tanks to be repaired, movements of tanks. We have movements between Fort Bliss and El Paso or Texarkana. So we have many movements within the State of Texas day in and day out.

Q. Do you have any moves down there in very out-of-the-way places where you could not anticipate such a move?

A. Yes, sir, we do that. We have a place on our railroad in West Texas where, until a few years ago, around the time of the war, we had nothing but antelope herds and a few thousand rattlesnakes. But because of the bright sunshine and the number of flying days per year, the Government set up an airbase, and we suddenly found ourselves transporting shipments of airplane engines and material of every sort into this airbase in West Texas. That has been inactivated here lately, but while the troops are gone the Government still has large warehouses there, and just recently we shipped something over 40 cars of what the Government terms "machinery" from some of the flying fields around San Antonio, Randolph Field, and others into this West Texas point where this material was stored. So those movements are very common in our state.

Q. Mr. Pistor, just what effect would you think that the assumption of jurisdiction over rates of government prop- [fol. 656] erty would have on the flow of this property?

A. Well, as I see it, Mr. McConnell, it will have these various effects, and this is the reason I expressed my earlier opinion. I believe you understand from my answers up here that because we do not have this opportunity to make rates for the government on this traffic that is of such an unpredictable nature and moves so suddenly, we do not have the chance to go through the usual procedure that we follow in establishing commercial rates, that is why we need something like this special quotation arrangement to take care of the Government and to give to the Government rates that are in substance the equivalent of the rates that we give industry. I think the Government is entitled to those rates. We certainly feel that we as railroads have this means available and it is the only means that I know of.

Now, if we are to begin to subject part of this traffic to state regulation then we are going to have a vastly different picture. First, as I see it, there will be a considerable increase in the cost of moving the government freight. The only purpose in giving to a state commission or some regulatory body the right to prove or disprove a given rate would be to fix the floor under it, as it were, to keep from putting in a rate that someone may think or may persuade the Commission is too low.

Yesterday I heard some testimony or some exchange [fol. 657] between counsel and the witness indicating that in the State of California you have a very benevolent or a magnanimous commission, and that is great. What we are here talking, I think, about an issue that involves a question in many states, and all states are not so blessed necessarily. In Texas, for one reason or another, as an illustration only, the rates on, let us say, jet fuel and gasoline by rail are much above the rates that are in effect by truck. The rates from West Texas, this Court may be surprised to learn, to a North Texas point like Sherman immediately south of the Red River, is actually higher than the rate from Kansas City to points in Iowa.

The rate on lubricating oil from Houston, Texas, to a point like Sherman, where there is an air force base, is actually higher if the shipment stays within Texas than if it went up into Oklahoma and then came back.

So we have a lot of instances in the states. I do not know whether that is true in California or not, but you certainly have it in many other states, where the Railroad Commission has not seen fit, let us say, to approve the same scale of rates you have interstate here or the same scale of rates, let us say, for one set of carriers in effect as for another set of carriers.

So if the Government is obliged to pay the freight which some State Commission will fix as the minimum, I know [fol. 658] that the cost will be considerably greater than it is today. That is point No. 1.

Q. Would they have to move on the class rates more often?

A. The traffic would either have to move on class rates or the Government would be relegated to maybe one form of transportation instead of two, if the rates were not equal, or the Government perhaps would have to employ longer routes to traverse interstate and come back into it to escape the authority of the State Commission, and that sort of thing.

The second thing that would take place or has to take place is this: There would need to be a segregation of the tonnage that is subject to the State's jurisdiction, and that which is not. In other words, if the State is to exercise authority over the rates on certain traffic, then we as railroads and the Government as the shipper will need to know what traffic that is. And that segregation would have to be physical as well as by records. It would require a much larger force than at present available to make that segregation and to keep the records, and, of course, that likewise would increase the cost.

Now, as General Lasher testified yesterday, it is not always easy to determine what traffic is subject to state regulation and which is not. We would have traffic moving into this big arsenal of defense and perhaps out of there it would be ordered to a port like Galveston, Texas, for [fol. 659] shipment overseas to some point where the tension is rising.

If it moved beyond the port in a commercial vessel, then according to my understanding the interstate rate would apply, or at least the traffic would not be subject to regu-

lations of the State. If it is picked up by a warship of the United States, then suddenly it becomes subject to State jurisdiction. It's an intrastate shipment, according to what the lawyers tell me.

So I point that out just to show you the problems we would have in determining whether the traffic is state or whether it is interstate, even though it may not get outside the borders of the state. So there would have to be a segregation.

Now, to avoid that sort of expense, increase in clerkship, increase in warehousing facilities and igloos, everything else that is used for the storage of that material, the Government, being prudent, would certainly seek means to escape the jurisdiction of the State.

Getting back to this huge arsenal again, which is just 12 miles inside the State of Texas, it is obvious, I think, as some witness testified this morning, that the Government would then begin logically, sensibly, to move stuff to Texarkana and then move it to Arkansas or Louisana and back into the state of Texas.

That would require the employment of added carriers, [fol. 660] the transportation overhead of miles, a delay in the movement of the traffic, all without any apparent benefit, so far as I can determine.

Now, if that becomes much of a burden, which I am sure it would, I think the next step would be, as General Lasher indicated here yesterday, to simply move the installations.

In this case here I am convinced in my own mind, and in fact it has been suggested already, that the installation might be moved to some point in Arkansas or Louisiana, not far from the Texas border, from which all of that vast amount of materiel flowing into the state of Texas would become interstate, and we would no longer be bound or hampered by the regulations of the state authorities.

In that case, of course, the location of the base or the arsenal would be at a point of secondary choice, if I might term it that. The arsenal would no longer be located at a point that was initially considered to be the most logical from the standpoint of the movement of supplies and materiel, but it would be located rather with regard to the exercise of state authority.

Now, one other point I would like to mention there, and that is the character of the movement of this materiel.

At the present time, as I think the General also testified, much of this material that we handle is of a secret nature. Very frequently we do not know precisely what it is, nor [fol. 661] do we choose to inquire into it. We delegate the man in Washington, as an example, to represent not only us but the western railroads to deal with the Government, and if he is persuaded that the basis of rates or the arrangement which the Government wants is satisfactory, then we accept his judgment and inquire no further into the true nature of the commodity.

Just recently here I had on my desk a proposition from the Atomic Energy Commission to establish rates on what was termed "Machinery with not to exceed 10 per cent high explosives". Well, I think all of us in this court room know that machinery and high explosives don't go together, and that the commodity was in fact something else which the Government did not choose to disclose.

We have movements of that character so far as description is concerned that we don't need to air, let us say, before the public under this present system.

Q. Under present Texas statutes, if they were applied to government shipments, would it be necessary to have an approved rate on that type revealing the nature of the thing?

A. Yes, sir, it would. Under the procedure in Texas there is a public hearing on any application for a rate change. If we were to come to the Railroad Commission of Texas, we would first file an application. We would set forth in this application the commodity, the origin and destination, the [fol. 662] rate, the reasons for w ting the rate established. That application is reproduced in toto in a notice of hearing and distributed by the Railroad Commission to parties throughout the state.

Then the matter is set for public hearing, and we need then to go before the Commission in a public hearing and describe in detail what we propose to do and why. Thereafter, the Commission will render its decision.

Normally it takes from 45 to 60 days for that to occur. That's an average.

Now, not only do we have this secrecy possible under the resent setup so far as descriptions are concerned, but nat is also true of movements. It is not uncommon, for instance, for us to receive a shipment of material from, let's ay, some connecting line at Forth Worth and then be asked o transport it, let's say, to Santa Fe at Sweetwater.

We will deliver it there and no one knows where it is oming from or where it is going to. That again is counter o the usual way commercial freight is handled. Commercial reight is usually billed from an origin to a destination and ontinue- right along the line and everybody knows the omplete story of the movement of that business, but that s not so with respect to very much of this government work.

Q. Mr. Pistor, about what is the volume of this governent freight that you handle there—not tonnagewise, but a

[fol. 663] transaction of this sort from day to day.

A. The movement is continual. I don't believe I could stimate it in tons for you. And it varies. I made a check ere at the time, I believe for a three-month period, and e had, as I recall it, several hundred cars, something like nat. Another period might be less again. Of course this as only traffic originating on our own railroad.

Q. When you make a special voluntary offer to the Govrnment to transport property for it in one of these movements, what criterion do you use to arrive at the figure you ive?

A. Well, we would give the Government a rate that we elieve we would give to industry under similar conditions. Ve wouldn't be disposed to give the Government a rate, if ou please, simply because it is the Government or because had a large volume of freight.

If some government traffic fell into a normal pattern nd it were suitable, or there were suitable commodity rates stablished, we would hope and expect the Government to nove traffic at those rates. But where we have so much of his military material that moves counter to the flow of ormal traffic, we would then establish rates or quote rates o the Government which would be in keeping with rates nat we would make to industry.

Mr. McConnell: No further questions.

[fol. 664] Cross examination.

By Mr. Phelps:

Q. Mr. Pistor, you have stated that government traffic is totally different from commercial traffic?

A. I am speaking of—is it Mr. Phelps?

Q. Yes.

A. I am speaking, Mr. Phelps, of the military traffic, primarily. That is the type of traffic on which we make these quotations normally. There is some government traffic which is similar to commercial traffic, but I didn't have that in mind.

Q. What you are saying now is that the government traffic which is different from commercial traffic is different from commercial traffic, isn't that what you are saying now?

A. I am saying that a great part of the government traffic that we handle is different from commercial traffic.

Q. Do you have any knowledge of the government traffic in California?

A. No, sir, only in a very general way.

Q. And did you make any attempt to inform yourself of the characteristics of government traffic in California before coming here?

A. No, sir, I did not.

Q. You don't know, I take it, what are the commodities the Government ships in California, do you?

[fol. 665] A. Oh, I know in a general way that they ship certain things like canned goods, subsistence material and ammunition, things like that here, but I would know nothing about the details of it, sir.

Q. And you don't know what patterns the government traffic flow follows in California, do you?

A. No, sir, I don't. I question that the military traffic follows any pattern.

Q. But you don't know, do you?

A. I do not, sir.

Q. And you don't know whether or not in California the government traffic moves opposite to commercial traffic or not, do you?

A. No, sir, I do not.

Q. Did you hear General Lasher testify?
A. Yes, sir.
Q. Did you hear him say, in substance, that most of the
vernment traffic in California was subsistence traffic?
A. I did, sir.
Q. Does that change your opinion in any way as to
nether or not government traffic is different from com-
ercial traffic?
A. No, not at all.
Q. It doesn't?
A. No.
Q. Is there something different about government food
ol. 666] from ordinary food?
A. Yes, sir, there could be there, as to the movement, the
lume of it, the direction of movement, all of that sort
thing could be vastly different.
Q. I am speaking of the commodity itself, Mr. Pistor.
there anything about food that is delivered to the Gov-
nment that's different from food delivered to commer-
al consignees?
A. If it's the same food, I would say no.
Q. Now, you stated that the purpose of your special rate
otations was to give the Government the benefit of com-
odity rates. Is it your understanding that California
w, the law that is the subject of this proceeding, would
ake it impossible for the Government to obtain commodity
tes in California?
A. No, I don't understand that, but I understand that
der the law the State of California, or the Public Utility
ommission, I believe it is called, would have authority to
prove or not approve a given rate.
Q. Do you know of any reason why the Commission of
alifornia, when it has been made to appear to the Com-
ssion of California that there is a substantial amount of
vernment traffic that moves regularly between certain
rminee and in substantial volume would not authorize a
mmodity rate for that traffic?
A. I have no reason to believe that, Mr. Phelps, but the
ol. 667] point goes far beyond that.
Q. Well, you have answered the question.
A. Yes.

Mr. McConnell: Will you let him explain?.

Mr. Phelps: You can ask him to explain if you think it necessary. I am satisfied with the answer that he has no reason to think the Commission wouldn't authorize commodity rates upon proper representation.

The Witness: That's right.

By Mr. Phelps:

Q. Now, you stated that under Texas law a public hearing is required before special rate quotations can be authorized. Have your opinions with respect to state regulation and the effect of state regulation been predicated upon the assumption that public hearings are necessary?

A. No, not at all. That simply delays the thing some more and exposes the application and rate changes and the like, which is also undesirable.

Q. Well, if it were the fact that a public hearing was not necessary that would remove one of your objections to state regulations, would it not?

A. A slight one, yes, sir.

Mr. Phelps: No further questions.

Mr. McConnell: No further questions. Thank you.

Judge Lemmon: Recess.

(Short recess.)

[fol. 668] Mr. McConnell: May it please the Court, with the Court's permission, Mr. Pistor has other engagements and if there is no further use of him he would like to be excused.

Judge Lemmon: He may be excused.

Mr. McConnell: Likewise, if it please the Court, we are probably getting out of a logical order in the presentation of our witnesses, but we are trying to accommodate the services and there is some question of a job left unattended. One is an Air Force witness.

Judge Lemmon: Call him.

HERBERT C. CHAMBERS called as a witness on behalf of the plaintiff; sworn.

By the Clerk:

Q. Please state your full name to the Court.

A. Herbert C. Chambers, Colonel, United States Air Force.

Direct examination.

By Mr. McConnell:

Q. What is your present position, Colonel Chambers?

A. I am at present the commanding officer of the Air Force district traffic office at Mira Loma, California.

Q. Colonel Chambers, will you give the Court briefly your background and experience in the Air Force?

A. Yes, sir. I entered the military service in 1930 and was commissioned in 1931. The preponderance of my duties have been divided between tactical units: one third tactical, [fol. 669] one third supply, and one third maintenance.

Q. What was your first duty?

A. My first duty was with the fighter organization in the Hawaiian Islands. During World War II I went overseas with the Strategic Air Command in the first Fortresses to England. I served three years in the European Theater. After the war I was assigned to headquarters at Wright Field. I have served three and a half years with the Inspector General, Headquarters, United States Air Force.

My last three and a half years prior to my present assignment was as chief of the Air Force Commission in Chile.

Reporting to my present assignment, reporting back to the United States and reporting to the appointing officials, I pointed out that my experience had not included transportation officer. They said they recognized that factor. They wanted a senior Air Force officer who had broad experience in Air Force matters and not a transportation officer to take command of this particular office, inasmuch as it was a management tool of the Air Force.

Q. So you did not purport to be a longstanding transportation expert, is that correct?

A. That is correct.

Q. Do you have a technical assistant under your command?

A. I do have, and my office is composed of technicians. [fol. 670] The general experience level is 18 years on up to 30 years.

Q. Speaking from the national point of view, Colonel Chambers, would you briefly describe to the Court the organization of the supply arm of the Air Force, using the pointer if necessary?

A. That is for the United States Air Force.

Q. For the United States Air Force.

A. It won't be necessary to use the pointer. We have the Air Materiel Command—the Air Force is divided into eight different commands, in which the Air Materiel Command is charged with the logistics support of the Air Force on a global basis, worldwide. Under the Air Materiel Command we have eight prime depots. A prime depot is a depot that is concerned with a certain number of aircraft. For instance, in the State of California there are two prime depots, one in Sacramento and one at San Bernardino. The prime depot at Sacramento is charged with being primed to furnish support to the aircraft, the responsibility of which they are charged with on a worldwide basis. If it goes down in need of a part, they are supposed to furnish that part on an immediate basis.

The Air Materiel Depot at Sacramento has procurement cognizance of aircraft such as the aircraft firms, such as North American and Lockheed, and the FDC-6 aircraft, which is one of our tactical aircraft. They are responsible [fol. 671] for that. One of the most outstanding aircraft which supports this Strategic Air Command from Norton Air Force Base, the Air Materiel Command there, is the C-1-24, which the Douglas Cargo four-engine, which directly supports the Strategic Air Command operations.

Q. About how many Air Force installations are in the State of California, roughly?

A. There are 67 Air Force installations—correction—within California there are two Air Materiel areas which I

ave named and one specialized depot, which is located in os Angeles. The Strategic Air Command has three bases: ne at Merced, one at March Air Force Base, and one at ravis.

fol. 672] Judge Carter: Hamilton?

A. No; Travis. Hamilton Field has two missions. It is ontinental Air Command and Air Defense Command.

Judge Carter: But I think his question was what Air orce installations, regardless of the nature of them, are ere in California. How many?

A. Offhand, I can't—well, there are about—I do not know pecifically at this moment.

By Mr. McConnell:

Q. Compared with other states there are a great many uch installations?

A. Comparisonwise, yes, sir.

Q. Enumerate some of the most important ones, both rom the standpoint of depots and operational installations.

A. In the logistics supply system we have two materiel reas, which I have named, the one at Sacramento and the ne at Norton. We have a specialized depot which is located t Cheli, in Los Angeles.

Mr. Phelps: Cheli—C-h-e-l-l-y, is that it?

A. Cheli—C-h-e-l-i. Maywood Air Force Depot, it is alled.

Then we have three Strategic Air Command Bases. We ave the Air Development Command which has a base at dwards.

By Mr. McConnell:

Q. What kind of base is that?

A. The Air Development Command is one of the com-

fol. 673] mands of the Air Force that develops and tests ll aircraft systems, weapons systems, which include the ircraft and/or weapons. It is very secret, a highly secret ase.

Q. Can you enumerate some of the others that you appen to think of?

A. George Air Force Base, which is very close to Edwards, which is a Tactical Air Command and has also a Defense Command. Principally those are the ones that we have.

Q. In addition to the number of operational bases and depots, are there also a number of manufacturers from which the Air Force secures planes and other supplies in the State of California?

A. Yes, sir. The State of California has the preponderance of the aircraft funds which are located either in the San Diego area, or—there are three in that area, and the Los Angeles area, which has many of them.

But the bulk of the Air Force aircraft come from between Lockheed, Douglas and North American, et cetera.

Q. Colonel Chambers, what are the present duties of your office as officer in charge of traffic for the Air Materiel Command at San Bernardino?

A. My district includes the 12 western states. And it includes the boundaries of three Air Materiel areas. One that I have not included thus far is at Ogden.

Judge Carter: Ogden, Utah?

[fol. 674] A. Yes, sir. And I serve on the staff of those three particular Air Materiel areas. We furnish rate and route information to all Air Force installations in those 12 states which come within my district. That is, rate and route information of 10,000 pounds and above.

By Mr. McConnell:

Q. Colonel Chambers, does a considerable amount of materiel, Air Force and otherwise, move between points in California itself?

A. Yes, sir. We have quite a number of intra-depot movements of spares. We have a considerable number of spares moving between the prime contractor such as your aircraft-airframe manufacturers—Douglas and such as that, Lockheed, North American.

We have considerable freight moving between these installations that I have mentioned to Travis, which is an aerial port of embarcation.

We have considerable traffic that moves into the port here at Oakland for shipment by water.

Q. Does the Air Force itself ever furnish supplies that belong to the Air Force to aircraft manufacturers in Southern California?

A. Does the Air Force furnish the airframe manufacturers? Yes, sir.

Q. Airplane manufacturers, their supplies.

A. Yes, they do. It is called "Government furnished [fol. 675] equipment"—GFE equipment. They furnish such things as engines and specialized equipment such as their black boxes, which are secret, and any of the weapons system of which the particular manufacturer is not interested in manufacturing. It is furnished and installed.

Q. You say a lot of that equipment is secret in nature?

A. Yes.

Q. Colonel Chambers, will you briefly describe or briefly explain to the Court the mission of the supplies arm of the Air Force?

A. I would like to develop, show you what we have in the way of a priority system and the reason for this priority system.

Since World War II where we had supplies pre-positioned and it was considered a war of plenty, the nuclear development of nuclear warfare has changed the strategy of air warfare, in which the pre-positioning in such large quantities is not required as it was in World War II, but the requirement has developed based on speed.

The speed of these aircraft—for instance, Strategic Air Command has a mission, which has been quoted many times to the public and announced by General Twining, the commander-in-chief of the Air Force, that Strategic Air Command constantly have these medium bomb wings on rotation, training rotation, in and out of positions around the world. [fol. 676] These aircraft fly at speeds of in excess of 600 miles an hour.

General Twining pointed out that this force in being must be supplied always. There can be no lag at all in the back-up of support of Strategic Air Command because of its importance, and that as such our transportation system should be geared to support a 600 mile an hour aircraft.

Therefore, to support that doctrine, we in the Air Force have developed many systems that use machinery that cuts out the human element. We have also developed a priority system.

I would like to cite, for example, for instance, a system that will soon be in effect. For instance, if an aircraft, say a C-124, in Japan were to lose an engine and the stores within Japan did not have that type of engine, with the system that we have, that will soon be in effect, on the teletype through electronic means, the depot in the Far Eastern Air Force will be able to put out a requisition on this teletype which will be instantly received direct to the Air Material area that has the prime responsibility for that aircraft, in this instance the C-124.

Q. Where would that be?

A. That is in Norton. In other words, it's an instantaneous sending and receiving.

Now, that engine would have a priority. We have priorities one through five.

[fol. 677] Now, that priority, in all probability, would come under a priority of priority No. 1, which means that the time that that requisition is received at Norton, 24 hours later that engine will be processed, it will be picked up from the storage, it will be de-pickled, it will be repackaged and shipped, all the paper work accomplished and it will be completely out of that depot and on its way.

Now, we in turn, would have to—that engine would be routed probably by truck overnight from Norton, at the end of that 24 hour period—take us about an overnight period—to Travis where it would be picked up and 48 hours later it would be ready to be installed in that C-124. That is the type of service, that is a type of a logistic system that the Air Force is developing today.

Q. You say an airplane engine of that type, to use as an illustration, might be shipped by truck to Travis Air Force Base?

A. It could be shipped from Norton to Travis, yes, sir.

Q. Would the trucking company know where the airplane was destined?

A. Where the engine was destined?

Q. The destination of the engine.

A. No, he would have no need to know; he would have no need to know. That isn't a security item, but the trucking company—neither the trucking company or the driver [fol. 678] would have any requirement to know as to where the engine is going or what its purpose is.

Q. If they don't need to know, the doctrine is you don't tell them, is that it?

A. That is correct.

Q. Could you——

A. Pardon me. I would like to go—I have covered priority one and two. Priority 3 and 4 require 48 hours, so you see there is 48 hours from the time of requisition—from the time the requisition is received until the time has been completely received, and there you have priority 1 and 2. 3 and 5.

Q. Many of these priority shipments made between installations in California, are they?

A. Many of them are shipped. The Air Force—yes, there are many shipments of this priority nature shipped inside of California, of which we need to operate—be able—our system is set up to where it can support that type of priority system that I have just described.

Q. Colonel Chambers, is it necessary in your operations to ship on quick notice shipments of many different items in one shipment?

A. Yes, sir. We have performed studies on that in the district traffic office, and within California we have determined that approximately 90 per cent of our shipments [fol. 679] are of the mixed nature.

Q. About how many different items are stocked by the supply service of the Air Force?

A. There are approximately 800 and some odd thousand items in the Air Force stocking system. That's give or take a few. It changes.

Q. Do you ship masses of parts to an installation in order to repair and reservice an airplane?

A. Yes, sir. That would be on the basis of—if an aircraft was out of commission for parts, which we call an AOCP, it would receive a priority of 1 through 5, depending upon the type of aircraft. If it's a tactical aircraft, it would receive priority 1. If it were going into stockage or storage,

it would receive a higher—a different category of priority in which we could ship it in five days.

Q. Just recently in your memory can you think of any recent illustration in which you shipped a mass of parts to reservice any airplane grounded here in California, anything of that sort?

A. Offhand, I can't recall.

Q. You can't recall?

A. No, sir.

Q. Colonel Chambers, do you feel that the state regulation of intrastate shipments of Air Force material between points in California would interfere with you in carrying [fol. 680] out your mission down there at Mira Loma?

A. Definitely; and I say definitely because we—our logistics system is based on speed and we can not tolerate anything that would interfere with speed. And, as I have pointed out previously, this Air Force mission is worldwide and I think everyone recognizes the importance that Strategic Air Command has played in present world affairs.

Q. Colonel Chambers, you mentioned the fact there are a number of shipments that are secret in nature made between the various installations in California and the various aircraft manufacturers in California. Could you explain that a little more in detail to the Court?

A. We have three types of shipments, of security type shipments. One, we have the so-called electronic gear called black boxes, which are overhauled by a certain company in—it's Hughes Aircraft. They are manufactured there, they are installed in aircraft, and whenever they come up for a reconditioning they are sent, returned to Hughes for reconditioning. That is one type.

We also have within my district many aircraft and warning sites. That's an Air Defense Command. These are radar sites that are located on the top of mountains and way off in the country, far removed from normal, of which most of their equipment, electronic gear, would be secret in nature.

Q. Would the location of those installations be secret in [fol. 681] nature?

A. Location of these installations, it is secret in nature.

We have a third area of supplies that we ship that are

manufactured in this state and also that originate within my district, such as the missiles, the missile program. We have considerable missile shipments.

Q. Those missile shipments are for testing in California?

A. Some of them are; some of them are for storage.

Q. Would it be possible for rate-making purposes to reveal the character and the nature of those commodities shipped to any commission for purposes of approval of rates?

A. Well, we wouldn't necessarily have to reveal the performance data of that particular type of a missile, but we would need to—we wouldn't want to reveal the number of shipments that do develop, nor the numbers of missiles that are involved or the points of origin and destination. We would certainly not——

Q. You just would not do it?

A. I wouldn't want to do it, and we would conceal that in so far as possible.

Mr. McConnell: I have no further questions.

Cross examination.

By Mr. Phelps:

Q. Your duties require, I think you said, Colonel Chambers,—— Strike that out.

I believe you said that in your office you had a number [fol. 682] of technicians working under your command, is that right?

A. That is correct.

Q. And are they the technicians who perform for your office the rating and routing of shipments for the government?

A. That is correct—for the Air Force, within my district.

Q. Yes.

A. For all traffic originating in my district.

Q. And I take it that in your office that you have a large library of tariffs and special rate quotations?

A. Yes, sir.

Q. And it is those publications that are consulted for

the purposes of routing your Air Force shipments, is tha
correct?

A. We do.

Q. Now, one thing that I noticed: You stated that yo
furnish rate and route information throughout these 1
states for shipments of 10,000 pounds and above. Do
understand that it is a part of your current instruction
the instructions governing your office and the local procu
ing offices, that for shipments of less than 10,000 pound
they may take the initiative and route those shipments o
their own; is that right?

A. That is correct: below 10,000 pounds.

Q. Now, when a shipment, when a requisition is referre
to your office for rating and routing, in many cases yo
have a rate or a published tariff rate or a special rat
[fol. 683] quotation already on file, do you not?

A. We—our tariff library is complete and we use onl
those commercial concerns who have furnished a tariff o
a facility. Does that answer your question?

A. Perhaps I didn't make it clear.

[fol. 684] Q. Is it not true that for many of the requis
tions that are referred to your office you confine withi
your rate the quotations, your special rate quotations o
the tariffs which you have on file, a rate which you con
sider appropriate and applicable, and which you are wil
ing to make use of for that particular shipment, is tha
right?

A. May it please the Court, I would like to dodge tha
question and refer it to the technicians. I have a techni
cian here who is going to follow me.

Q. I shall not press it.

A. If it is of a technical nature I would prefer not t
answer it.

Q. I shall not press it. I will withdraw the question.

What is your understanding, Colonel, of the Californi
law with which we are concerned in this proceeding?

A. As the law has been explained to me by my techni
cians, I will explain it to you in a broad sense, that we hav
Section 22 involved, which authorizes the military to shi
on a freight-all-kinds basis without too much trouble. I

allows us to opefate with the speed that is required within our logistic system.

I understand that the center of this case is that this Section 22 would be removed, and if that authority that we now presently operate under is removed, we would be required to negotiate most of our shipments, the rates of [fol. 685] our shipments. That in itself would constitute a delay, which in the air force we could not tolerate.

Q. You say you would have to negotiate your rates. You negotiate some now, don't you?

A. Freight rate negotiation is not done by our office as such. That is on volume movement. It is accomplished at Wright Field.

Q. Yes, but there is a rate negotiation that takes place under the present practices of the air force materiel command, isn't that true?

A. Under the volume movements.

Q. Although not done in your office?

A. That is correct.

By Judge Lemmon:

Q. Is the negotiation before or after the shipment?

A. Sometimes, sir, it is done after the shipment but sometimes before. We normally try to pre-plan—normally on a volume movement we try to get as much information as we can, pre-plan it and advise the proper authority.

Q. In the ordinary movement that is not large?

A. Again I would prefer to refer that question to my technician for answer if I may.

Mr. Phelps: I have no further questions.

Mr. McConnell: I have no further questions.

(Thereupon the witness was excused and retired from [fol. 686] the witness stand.)

GORDON W. BENGTSON, Lieutenant Commander, Supply Corps, United States Navy, called as a witness on behalf of the plaintiff; sworn.

Direct examination.

By Mr. McConnell:

Q. Commander Bengtson, what is your present position?

A. I am the officer in charge of the Navy Central Freight Control Office at the Naval Supply Center, Oakland, California.

Q. Will you kindly state to the Court your background and experience in naval supply and your previous training?

A. I entered the Navy in 1935. I was commissioned in 1942. I had had varied supply and disbursing duties aboard battleships, heavy cruisers, attack transports and naval air stations outside the continental limits of the United States, naval shipyards in and outside the continental limits of the United States, naval training centers, and naval supply centers in and outside the continental limits of the United States.

I am a graduate of the U. S. Navy School of Freight Transportation and have been assigned at the Navy Central Freight Control Office at Oakland for the past 21 months.

Q. Commander Bengtson, would you briefly describe to [fol. 687] the Court the general supply function and supply lines of the Navy, using the pointer on the map there?

A. In many respects it is very similar to the supply system as described by General Lasher. Each broad category of Navy material is under the inventory management of a supply demand control point. This supply demand control point is charged with the responsibility of maintaining proper stock levels, initiating procurement, and exercising inventory management of a particular category of material.

For example, we might use items that are peculiar to the engineering spaces of a ship, electronics, the material parts that are used in the engineering spaces. In that in-

stance the supply demand control point is located at Mechanicsburg, Pennsylvania, about there (indicating), and the procurement contracts are awarded to the manufacturers located in the states of Pennsylvania, New York, Ohio and Michigan. Inspectors of naval material or sometimes the manufacturers, will ship this material from these points to coastal supply depots, one of which is located in San Diego; also the naval supply center in Oakland, which is the main distribution point for the West Coast. Also to a backup and reserve depot at Clearfield, Utah, located in there (indicating), and also in some instances they will ship direct to shipyards in Mare Island, San Francisco and Long Beach, which is a primary stocking point, and [fol. 688] material is used there in connection with the construction of vessels and ship overhaul.

Q. What is the primary mission of the naval supply service?

A. Will you repeat that, please?

Q. What is the prime mission of the navy supply service?

A. I didn't hear that last word.

Judge Carter: Navy supply service.

By Mr. McConnell:

Q. Navy supply service? The system? What is the primary mission of it?

A. The mission of the navy supply system is to provide logistic support to all of the operating forces and components of the Navy.

Q. And what would they largely be?

A. The activities in our area?

Q. The ships at sea, is it not?

A. Yes. The ships operating at sea, the naval aircraft, bases outside the continental limits of the United States, and also your activities within the continental limits of the United States.

Q. The tendency would be for it to be going out toward the seaboard, is that not right?

A. The movement is always from the interior out to coastal distribution points, that's correct.

Q. Would you trace a typical piece of navy material?

Just draw a line on that map, something you take at [fol. 689] random, from its life history.

A. (Going to blackboard.) Do you want an example of one that is——

Q. One that might move from point to point in California.

A. Well, we could issue at the naval supply center at Oakland——

Q. (Interposing) Excuse me.

Mr. McConnell: Will you read the question again?

Judge Carter: He wants to know from the time of its manufacture.

By Mr. McConnell:

Q. From the time of its manufacture through its life history in the Navy, some typical item?

A. I might take a piece of fire control equipment like a Marks 56 gyro.

Q. Will you explain what is the purpose of that kind of equipment?

A. The Marks 56 gyro is a major part of the director of ships that controls the horizontal and vertical movement of ships' batteries aboardship. They are valued somewhere in the neighborhood of $14,000.

Q. Well, let's take that piece of equipment. That's a good one.

A. Is that all right?

Q. Yes.

A. It is manufactured, to the best of my knowledge, by [fol. 690] the General Electric Company in Long Island—no, at Schenectady, New York, and also by the Ford Instrument Company at Long Island—at this point (indicating on map).

That gyro will be shipped to, we will say, the naval supply center in Oakland, where there it might be issued to the shipyard at Mare Island.

Q. How long might it stay at the Oakland Depot?

A. Perhaps a few months.

Q. Go ahead.

A. It will be installed in a ship at Mare Island. And

the gyro is rather a delicate instrument. It has an endurance factor, a lifetime. By that I mean it can be in operation for a given number of weeks or months.

At this point it will be on board a ship which might proceed to San Diego and operate; there to a Pacific Ocean area. After a number of months it may be returned to a shipyard at Bremerton and be removed at that point and replaced with a new gyro installed at the shipyard at Bremerton, and the used gyro will return back to a point in Long Island or College Point, New York, where a manufacturer has been awarded a contract to test the gyro, make any necessary modifications or repair it.

Q. Is that a typical example of the flow of Navy materiel?

A. That is one that is in constant circulation.

Q. Might that gyro come back to Oakland?

[fol. 691] A. After it has been tested and repaired?

Q. Yes.

A. It might go to Norfolk, Virginia, or back to Oakland.

Q. From Oakland might it go to San Diego?

A. Again, yes, it may.

Q. What are the principal duties of your office out there at Oakland, Commander Bengtson?

A. We act as a field representative for the Bureau of Supplies and Accounts. We provide traffic management services to the shipping activities in the states of California, Nevada, Utah and Arizona.

Q. In connection with your duties do you make arrangements for the rate of shipment of government property?

A. Generally not. We make recommendations to the Bureau of Supplies and Accounts where we feel that rates are excessive or in cases where we feel adjustments are necessary.

Q. Could you tell the Court some of the most important installations here in your area, in California and the West Coast, for which you perform the traffic managing service at your office?

A. The Naval Supply Center in Oakland; Naval Supply Depot at Clearfield, Utah; and at San Diego; the Navy Shipyards at Mare Island, San Francisco and Long Beach; the Naval Air Stations at Alameda, North Island and El

[fol. 692] Centro; the Navy Ammunition Depot at Hawthorn, Nevada—that is outside of California.

Q. But that is in your area?

A. Yes, that is right. And the Naval Magazine at Port Chicago.

Q. About how many pounds, just a rough guess if you can make it, of traffic moves monthly between these installations and to and from installations here that are under your control?

A. Approximately 73 million pounds.

Q. Where does the greatest volume of that traffic flow, Commander Bengtson?

A. The greatest volume of our traffic flows between the Oakland-San Francisco Bay Area to the Los Angeles territory, including Long Beach and San Pedro; from the Oakland-San Francisco Bay Area to San Diego; between the San Diego area and the Los Angeles territory, including Long Beach and San Pedro.

Q. What is the general nature of the traffic and materiel that moves in this channel or flow which you refer to as your major flow?

A. Most of the material that flows between this channel of traffic is material required by ships operated at the San Diego and San Pedro areas, and also material in connection with support of naval aircraft in the El Centro and San Diego area.

[fol. 693] Also material used in connection with ship construction, overhaul and repair, at the Long Beach Naval Shipyard. Also some material used at activities located in California—shore activities. The items will consist of almost every conceivable item.

[fol. 694] Q. About how many items—may it please the Court?

Judge Lemmon: You finish your direct examination.

By Mr. McConnell:

Q. About how many items do you carry in the Oakland Depot?

A. Do you mean the Oakland Supply Center?

Q. The Oakland Supply Center under your supervision there in the warehouse.

A. There would be hundreds of thousands.

Q. Are most of these items items that are used in the maintenance of ships and operation of ships?

A. That is correct.

Q. What activity does the Navy carry on down there in the San Diego area principally?

A. The San Diego area is an operating area for naval vessels, the training area, or an area that—they lay in port in preparation of going to training areas outside the continental limits of the United States.

Q. What about the Long Beach and Los Angeles basing area?

A. In some respects the same situation applies there, except the shipyard at Long Beach is primarily concerned with ships overhaul and repair.

Q. It is your custom in shipping to these installations that are engaged in the maintenance of the fleet, to ship in carload lots of many items?

A. In truckload lots and carload lots as much as possible. [fol. 695] Q. About how many items might be contained in one truckload?

A. In a truckload shipment of 40,000 pounds, approximately 170 to 200 items of material go to support ships; all categories of material.

Q. How long does it take you at the present time to make the shipping arrangements for a truckload lot of a mass of items of that sort?

A. At the present time there is no particular problem in making arrangements.

Q. Are many of those shipments that you make in mass of these items that are designed to support the ships at sea, are many of them urgent in nature?

A. Yes, that is correct.

Q. Could you give me several illustrations that might illustrate that?

A. Vessels operating in the area, we will say, for example, like San Diego, are subjected to frequent sailings and their itineraries might be such that they are shipped very rapidly. And on a number of occasions shipments have

to move to that area to meet deadlines brought about by the scheduled sailings.

Also aircraft squadrons located at air stations, we will say at El Centro, where material is furnished on a day to day basis, pretty much due to the mobile characteristics [fol. 696] of aircraft, they move with the squadrons. Many of these items are replacement parts that are very necessary to keep the aircraft in operation.

Q. Commander Bengtson, have you made a study of the recently enacted statutes which are the subject of this controversy with a view of determining just what effect it would have on your operations of this sort?

A. By study, yes. We determined the number of man hours that would be required to completely classify a representative shipment.

Q. Is it your understanding that under the present California law, in the absence of this injunction, that you would have to ship under a class rate? Is that correct?

(Colloquy between counsel inaudible to the reporter.)

Mr. McConnell: His question was not responsive and I am just trying to elicit the real meaning.

Q. Is that correct?

A. Under the present system we ship on a freight all-kinds.

Q. If the statute went into effect, how would you ship?

A. We would be required to ship under the rates established under the PUC minimum.

Q. Go ahead. As you understand it, what would be the requirements in making a shipment under the minimum PUC regulations?

A. We would be required to classify every item in the [fol. 697] shipment.

Q. Have you made a study to determine just how long it would take you to formally comply with the requirements of the PUC regulations for typical carloads or truckloads?

A. A shipping activity went through the process of completely classifying a shipment, a 40,000 pound truckload shipment, and approximately 13 hours were expended, 13 man hours were expended in complete classification of all the items in this truckload shipment.

Q. Would there be additional difficulties that would take place in the shipping—on the shipping platforms and the loading operations?

A. Well, these 13 hours represent strictly operating hours before the shipment could get under way, and those additional man hours represent for all purposes a delay before the shipment could be made.

Q. Might a delay of that sort at some time in your shipments of this sort, might they be crucial for operational purposes in the Navy?

A. I think so.

Q. Can you think of an illustration that comes to your mind?

A. If we were required to meet a deadline to ship material to ships operating where it would be required we ship on very short notice, those additional hours required [fol. 698] to completely classify the shipment might result in a delay in meeting that deadline.

Q. Might result in the ship not sailing?

A. It might result in the ship leaving port without the items on board. The sailing—I wouldn't say. If the item was important enough, it might.

Q. Commander Bengtson, if this new rate structure went into effect, would you have to increase your staff out there at Oakland?

A. In my office I think so, yes. Also in the shipping activities, we would be required to beef up their sections where they classify the shipments.

Q. About what percentage do you think your organization would have to be increased?

A. Approximately 50 per cent.

Q. Commander Bengtson, have you made any study since it was contemplated that this regulation would go into effect, to determine some typical shipments, how much more the freight bill would be for these mixed carload shipments, if you had to make them under the minimum rate schedule of the Commission, more than they would be under the present negotiated rates that you are using?

A. It is very difficult to determine in dollars and cents exactly how much it would cost over a given period of time. The 13 additional hours required to completely classify the

[fol. 699] shipment represents labor costs, and the 13 additional man hours would be approximately $25 a truckload.

Q. What would the increase in rates be? Did you make such a study?

A. There again, that is difficult to determine throughout the entire State of California without making a complete traffic study. A representative, or bills that we have made a study of, just through our main channels of traffic, reflect increases up to 45 per cent.

Q. That is in rates. Commander Bengtson, as a practical matter, would you have difficulty in determining which of your shipments were intrastate in character and which were interstate in character for purposes of determining whether or not you would come under the State Commission's jurisdiction?

A. I think so, yes.

Q. Will you explain that in a little detail?

A. At the present time we make no distinction between intrastate and interstate in so far as segregation is concerned where it is definitely know- that the material is intrastate or interstate. If we were required to make shipmen-s under the minimum rate order, rates would have some effect. We would have difficulty in segregating freight by the classification ratings.

Q. At the pr ent time when you make a shipment of [fol. 700] many items down to San Diego, for example, when they would be used in the repair of ship or for the operation of a ship ready to go to sea, you might include in there many items which might be used at the Naval Base at San Diego, is that correct?

A. That is correct; as long as we know the ship is operating in that area, not destined to go overseas.

Q. Commander Bengtson, do you have under your control movements that are secret in nature?

A. Yes, that's right.

Q. Are those movements rather frequent in the State of California?

A. Quite frequent, yes.

Q. How are the rates arranged for those movements at the present time?

A. Rates for movements of security material are usually arranged with the Bureau of Supplies and Accounts, often on a one day notice under emergency quotations. The material is usually described as military freight and does not divulge its complete description. It is not described for reasons that it would be in violation of the navy security regulations if it were completely described.

Q. You think in conformance with Navy Regulations you could reveal the nature, the direction, weight and so forth of the shipments for purposes of rate making to a public [fol. 701] body?

A. Not without violating security regulations, no.

Mr. McConnell: That is all.

Judge Lemmon: Adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken to tomorrow, Wednesday, March 21, 1956, at 10:00 o'clock a.m.)

[fol. 705] Wednesday Morning Session, March 21, 1956, 10:00

The Clerk: United States of America v. Public Utilities Commission of the State of California; further trial.

Colloquy Between Court and Counsel

Mr. McConnell: May it please the Court, may I take up a preliminary matter in connection with the nature of the proceedings?

Judge Lemmon: You may.

Mr. McConnell: As yet we have not received the statistical study that was referred to at the beginning of the trial in connection with trying to shorten the trial. We do not know what that statistical study is, but we imagine it may be a waybill study of some sort and with statistical inferences drawn from a mass of shipping documents. The government, not knowing what it is, has no knowledge of its value nor does it have any knowledge of its efficacy. We would feel that it would be incumbent upon us to have our statis-

tical experts analyze it. We have one statistical officer in the Defense Department who is familiar with studies of this sort. The ICC has a Bureau of Transportation Statistics which has conducted studies of this sort. We are somewhat troubled about having a matter of this sort come in without our experts actually analyzing it. It may be a perfectly valid study, for all we know.

The time element is bothering me. We could wire now and [fol. 706] have our statistical experts flown out here. They are not preparing such a study. We had hoped to simplify the matter as much as possible. We have assiduously kept out the ICC studies, which we did not adopt. They have made extensive studies over a period of years over the whole United States, to compare the government rate with commercial rates. We did not bring them on to demonstrate anything by them. We felt it would be a collateral issue to this main interference issue that would go off by itself with a lot of speculation as to statistical inferences, whether or not it was a fair sampling, and we would soon go off in a long and tedious Public Utilities case, we felt; but we were somewhat troubled by the turn that the case might take if this offered.

I wondered if it would be possible—we certainly do not want to drag this thing out—to leave the record open or something of that sort.

Judge Lemmon: When will this data be available?

Mr. McConnell: When will it be available? You said it would be available yesterday.

Mr. Phelps: It has been prepared, Your Honors, and is presently here. The reason I have not distributed a copy to counsel is because we have not yet decided whether or not we wish to offer it.

Judge Hamlin: I did not hear that.

[fol. 707] Mr. Phelps: As to whether or not we wish to offer it. Let me explain what I have in mind.

Judge Lemmon: When the government sees it, they may want to offer it.

Mr. Phelps: Possibly. Possibly. From the very beginning I had supposed, in view of the allegations contained in the complaint with respect to government traffic and allegations that government traffic has this characteristic and

that characteristic, I had felt that it would be fundamental that the government would put in as part of the case a representative statistical summary of what that traffic was. Now, we have not had it. All we have had is some random examples offered by various witnesses, which I am going to argue when the time comes, if the plaintiff has nothing further, are grossly inadequate to tell this Court what the traffic pattern is. In the meantime, the defendant, as best it could, anticipating what I had supposed was the desirability of showing what this pattern is by types of commodity, point of destination, point of origin, and so forth, set an eight man team to work some weeks ago examining the shipping documents in the offices of the various motor carriers and rail carriers in California, and I have looked at it very hurriedly, Your Honors, and there is room for differences of opinion, I concede freely, whether or not the summary we were able to put together within the limited [fol. 708] time we had available is a representative showing. The reason I have held it back is because I and my associates have not yet arrived at a decision ourselves as to whether or not we wish to offer these studies as representative of the traffic that is transported in California on behalf of the government. I have no objection to giving copies of it to counsel now if he wants, but it should be understood that the defendant has not yet decided whether or not it wishes to offer it.

Mr. McConnell: Do you have the documents available on which the study was prepared?

Mr. Phelps: No, we do not, Your Honors. I should add that. Let me say how this was done. The shipping documents from which the study was made are contained in the offices of some ten or twelve motor carriers in California. We first began by trying to use 25 carriers, but that proved to be far too ambitious an undertaking; we realized that with the limited time we had to cut it back. So now we have, I believe, 10 carriers that we selected, I think more or less at random, although I believe we can show that they represent a group of carriers who carry a substantial amount of government tonnage.

Now, those 12 carriers, or 10 maybe, maintain in their offices, of course, their copies as permanent records, bill

of lading representing this government traffic. It shows commodity, origin or destination, and the charges. [fol. 709] Now, we have had these eight men visiting the offices of these 10 carriers, working in teams of two, and they go through all of these government freight bills, these bills of lading, and they take off on working papers, big broad yellow sheets about this size (indicating), they take off the data that I have just described: origin, destination, so on. They bring that back to the Commission's offices and there compile it, and it is condensed still further into a summary which has now been mimeographed and run off, and it is a summary which we now have available. And I believe also the working papers.

(Colloquy between counsel inaudible to the reporter.)

Mr. Phelps: The working papers that I referred to from which this data has been taken off is available, or can be made available, but the original documents, the carrier's copies of bills of lading, are still in the carriers' offices all over California: some down south in Los Angeles and some up here.

I should like to get this—if I make available to counsel these copies at this time, I would like to have an expression of opinion from counsel now as to whether or not we are going to be required to bring up to this courtroom all of these eight men who have contributed to putting this study together. I think that will be wholly unnecessary. I will be glad to have one of our witnesses describe how this [fol. 710] study was prepared, but I think it would be burdensome and——

Mr. McConnell: We would have no objection to bringing a man that supervised the statistical study.

Judge Lemmon: Couldn't you go further than that and take counsel's word for it and stipulate as to the manner in which the data was prepared?

Mr. McConnell: May it please the Court, I have absolute faith in the statisticians in the Commission, the representatives here, the United States. I would feel constrained to follow the strict rule in connection with this and have the documents themselves available for study by government experts, and I certainly would hate to drag that in here, but if the Court pleases, the study, the report itself,

may be to its advantage, but there is one thing that is troubling us here. There is so much—the reason—as I say, I am not a transportation expert in any sense, but I have seen so much of areas of dispute between statisticians as to the validity of what you call a waybill study. I have just observed that among the statisticians themselves there is not a unanimous opinion as to what is a valid waybill study and what is an invalid waybill study. Whether it is the depth of the sampling or what other elements are there, I don't know.

I think the government probably has copies of all these waybills, the whole mass of them for any given period of [fol. 711] time; if you cover a month, it might be possible with the cooperation of the government's statisticians, if this thing is relevant, and the Commission's statisticians, to take the whole thing. That would be cumbersome, but it would seem to me in the nature of these waybill studies, and the ICC made—they are supposed to have the best statisticians, transportation statisticians that they can get, the Bureau of Transportation Statistics; they come out with this waybill study, and if I would mention it to, say, someone in the New York Central, their statisticians, I wouldn't hang my hat on that, bad for this, that and the other reason. It would seem to me the government—I would be constrained to have our statisticians examine the underlying material.

Mr. Phelps: I should say this, Your Honors, before I complete my response to Your Honors: In addition to the motor truck carriers whose bills of lading I have just referred to, we have also requested of the Southern Pacific and the Santa Fe, the similar material. I have had long talks with counsel for both of those companies. It turns out that the records of the Santa Fe are not kept in California: they are permanently kept in Topeka, Kansas. So it quickly became apparent that it would be impossible within the time available to get a study of the Santa Fe. So we—the only rail that we were able to work with was the Santa Fe—

[fol. 712] Judge Carter: The Southern Pacific?

Mr. Phelps: I beg your pardon. The Southern Pacific. I have talked with Mr. Burkett, their attorney, and they

requested that a subpoena duces tecum be issued, and I have obtained from this court such a subpoena and had it served. And under subpoena they have prepared and come up—had prepared a summary of their government bill of ladings for the period April 1955, which was a period which we selected more or less at random, pushing the time back some time in advance of the time when this present litigation arose, so as to get a representative picture of the traffic. So we picked April 1955, and the Southern Pacific, as I understand it, have available a study showing the data I have just referred to for their traffic for that month.

Judge Lemmon: They have not prepared that, have they?

Mr. Phelps: Yes, I understand they have, Your Honors. Now, I have not seen it. I have arranged—I hope I have arranged—I tried this morning to arrange a conference with the Southern Pacific witness who will have that study, to be in our offices tomorrow morning at 8:30. Now, I was not able to reach Mr. Burkett, the attorney. I left a message requesting it, and I have not as yet seen this study myself, Your Honors.

Mr. McConnell: Will you furnish me with the study? I would like to get it so— We have some experts here.

[fol. 713] Mr. Phelps: Yes, I will be happy to supply copies of the trucking study, which we now have.

Mr. McConnell: Our theory has been— Maybe it has been too elliptical— We have men, and I would think a man like a trucker, who is doing it every day—he would know what the thing was in a general enough way for purposes of a constitutional law principle; just as a man who sits in the Marine Corps traffic control ten years will have a certain general rough idea, and that was the theory of our presentation of the matter, more or less a practical one.

Judge Lemmon: You may proceed.

Mr. McConnell: Commander Bengtson, please.

[fol. 714] Gordon W. Bengtson, called as a witness on behalf of the plaintiff, resumed the stand.

Judge Lemmon: I believe we were on cross examination of this witness.

Mr. Phelps: I was not sure.

Mr. McConnell: No further questions on direct.

Cross-examination.

By Mr. Phelps:

Q. Commander Bengtson, you stated in your direct that most of the volume of traffic with which you are concerned moves between Oakland and San Francisco, on the one hand, to Los Angeles territory, including Long Beach and San Pedro, on the other hand, and another movement from Oakland to San Francisco, on the one hand, to San Diego, on the other hand, and between San Diego and Los Angeles. Do you recall that testimony?

A. Yes, I do.

Q. Are you familiar with the movement of commercial traffic in California?

A. Not to the same extent that I am with military traffic or navy traffic.

Q. But you have some familiarity with it, I take it.

A. Very generally.

Q. Then don't you know, Commander, that the movements I have just described between those termini are the very [fol. 715] termini between which tremendous volumes of commercial type of traffic move? Isn't that true?

A. I would like to qualify that by saying this, that many of our activities are not exactly in the same channel of traffic. The activities may be located outside the metropolitan area of Los Angeles territory or basin territory.

Q. Are you familiar with the fact that in commercial traffic parlance the Los Angeles territory encompasses a very wide area around the metropolitan Los Angeles?

A. Not exactly. Generally.

Q. Let's see. Are you saying generally you know that that is the fact or you do not know precisely what the facts are?

A. I know that Long Beach and San Pedro are activities adjacent to the Los Angeles territory.

Q. Isn't it true that commercial type traffic moves in both directions between those termini?

A. I am not sure of that.

Q. You do not know?

A. No.

Q. So you are not able either to confirm or to deny the testimony by Mr. Pistor the other day about government traffic being wholly within every commercial type traffic area?

A. I say it is different in this respect: that it does not move to the same places in each territory. It might be moved to an activity outside the metropolitan area.

[fol. 716] Q. Would you concur in the opinion expressed by Mr. Pistor that government traffic as it moves in California is totally different from commercial type traffic?

A. In some respects I think it is totally different.

Q. In some respects it is totally different. Let us see. Let us take types of commodity, for example. What is the commodity which is most frequently moved between the Oakland-San Francisco area, your Oakland Naval Supply Depot, and the Los Angeles area, as you described it yesterday?

A. Navy freight for consumption by naval vessels, ultimately naval vessels.

Q. It is food, isn't it?

A. Sometimes.

Q. I would like to know, Commander, what is that commodity which moves in the greatest volume between San Francisco, Oakland and Los Angeles? Do you know what it is?

A. I am not prepared to quote tonnages. I will agree that food is one of them. However, general freight is another in great volume to support ships' repair, overhaul and military supplies used for the ship and also for activities that are in that area.

Q. Have you made any study recently in preparation for this hearing or for any other purpose of the types of commodities that do move out of the Oakland Supply Depot?

A. Our statistical records indicate only broad categories [fol. 717] of material moving to different destinations.

Q. Are you familiar with those results?

A. I am not prepared to quote them, no, sir.

Q. So that at the present time you can not tell this Court what are the commodities that move in the largest volume out of the Oakland depot, is that right?

A. At this moment, no.

Q. I take it your answer would be the same with respect to the destinations of it?

A. That is correct.

Q. You spoke of a certain shipping activity which recently conducted, I take it, a kind of experiment involving a 40,000 pound truckload lot of a mixed shipment. Would you tell us what that shipping activity was?

A. The Naval Supply Center, Oakland.

Q. That is your own, I take it?

A. That is the activity where I am attached, yes, sir.

Q. So I take it you have some familiarity with the circumstances surrounding that experiment?

A. The activity that conducted the survey is in the operating business. They ship, receive, transship, whereas in my office we are strictly in the traffic management for all the shipping activities in the area. I am only familiar to the extent that I know what goes on generally at the Supply Center in Oakland.

[fol. 718] Q. Do I understand, then, Commander, that you are not now prepared to testify from personal familiarity with that experiment?

A. I am prepared to say this: that as a result of the survey I was given a report indicating the additional man power involved.

Q. Do you have that report here?

A. My technical assistant has it, yes.

Mr. Phelps: May I see it?

Mr. McConnell: Mr. McKinney, do you have the study that was made?

Mr. Phelps: Meanwhile I will move along, Commander. Perhaps we can shorten it.

Q. How many different items were included in that truckload lot?

A. As I previously stated in my testimony, I said approximately 170 to 200 items are usually in a truckload shipment of 40,000 pounds. I am not positive how many items there are in that particular survey. I would guess roughly 200.

Q. Let us see, Commander, if I can inform myself of the

contents of this briefly without using up too much of the Court's time. This appears to be headed with "Memorandum from H.L. Ragain."

A. It is signed by Ragain, as I remember.

Q. Addressed to "Officer in Charge, Naval Center Freight [fol. 719] Control Office." That is you, is it not?

A. That is correct.

Q. It purports to be from "Freight Terminal Officer." "Subject: Classification Time Study." And there is enclosed copy of a certain bill of lading consisting of 36 pages and a copy of another bill of lading consisting of 39 pages. The first one has 218 line items, the second 226 line items, somewhat more than your estimate, your recollection of the number of items, is it not, Commander?

A. A few, yes.

Q. And somewhat more than the usual mixed shipment, isn't that true?

A. As I stated, between 170 and 200 items is a representative shipment of a truckload.

Q. But the subject of this study is two bills of lading, one with 226, one 218.

A. I had no knowledge that there are two bills of lading there. I know of only one such bill of lading in the survey.

Q. I have not checked either. I am referring to the top of the memorandum, which refers to two enclosures, two bills of lading, does it not?

A. If you will read the enclosure, the bill of lading has the same number.

Q. This was a single bill of lading, then?

A. I believe so, yes.

[fol. 720] Q. And this bill of lading has not 218 and not 226, but those two added together.

A. I do not believe so, no.

Mr. McConnell: If it please the Court, Mr. McKinney, who supervised the study, will be the next witness on the stand and I think that probably we can bring out these things a little better than the Commander. He will certainly be available to you.

Mr. Phelps: He will be the next witness, counsel?

Mr. McConnell: He will be the next witness.

Mr. Phelps: That reminds me that I intended to ask you

a question this morning. May I inquire whether or not you have a technician from the Air Force? I understood following Colonel Chambers' testimony yesterday there would be such a witness.

Mr. McConnell: Mr. Broz, who used to be with the Commission.

Mr. Phelps: I will defer any further questions on that study to the next witness.

Q. You have stated in your direct that if the statute in California became effective you would have to rate your shipments from the Commission's minimum rate order No. 2, and you would have to employ, or the government would have to employ increased personnel to the tune of about 50 per cent. Do you recall that?

[fol. 721] A. I recall that I said 50 per cent in classification functions.

Q. Yes. I would like to have you tell us a little more how you arrived at that 50 per cent increase.

A. In my own office we are required to audit bills of lading, copies of memorandum bills of lading, and a study made in my own office reflected a 50 per cent increase in time expended in complete classification of the items on a bill of lading.

Q. Is that the same— Excuse me. Have you finished?

A. No, sir, that is not the same study.

Q. Do you have that study?

A. I do not, no. We might use that bill of lading as an example.

Q. Is it your opinion that this bill of lading study that is the subject of this memorandum that I have been referring to from H.R. Ragain will confirm your estimate of an increase of 50 per cent in your personnel?

A. I think that bill of lading would reflect more than 50 per cent.

Q. Because that is an unusual one, i. that right?

A. No, I would not say it is unusual. It is typical of a 40,000 pound shipment, to the best of my knowledge.

Q. Didn't you tell us that 170 items was the average or representative number of items in a mixed shipment?

[fol. 722] A. That is correct; 170 to 200. I do not feel

that 18 additional items is too significant. It could be more or less.

Q. Now, you told us about a 45 per cent increase in the rates. Could you tell us how you arrived at that conclusion?

A. We arrived at an increase in rates up to 45 per cent. There again, as I stated in my testimony, those were just random bills taken from the well-ingrained channel for traffic. It would be impossible to make a complete survey of all of the traffic moving in intrastate California. As a result of those surveys of those bills, it reflected an increase up to 45 per cent.

Q. Was that the subject of the study, those bills?

A. It was an examination, yes, of those bills.

Q. Is that study in such a form as this one that I am referring to?

Mr. McConnell: If it please the Court, Mr. Phelps, Mr. McKinney, who follows the Commander, will have those representative bills of lading. We do not plan to offer them because we do not want to clutter the record too much, but they will be here later.

By Mr. Phelps:

Q. Now, you said you would have to segregate your shipments as between intra- and interstate shipments. When you have a requisition upon your office or a consignment [fol. 723] of goods, let us say, to a point in Los Angeles, when that requisition is filled and you draw out of your stores the physical goods with which you are going to fill that shipment, that is a segregation of a sort, then, is it not, Commander?

A. I am not in any way connected with that particular type of operation.

Q. Now, you testified, Commander, that you are going to have to segregate these goods as between intrastate and interstate, and I want to know just why you are going to have to segregate in some way that you don't do it already.

A. I am speaking of the shipping activity, not as the issuing storehouse.

Q. Well, it is true, is it not, even without expert knowl-

edge, that when a requisition is filled a certain specific lot of goods is pulled out of the stores or your warehouses and allotted or appropriated to that particular requisition, isn't that true?

A. That is correct.

Q. All right. Now, that is a segregation of a kind right then, isn't it? You are pulling it out from the mass; isn't that true?

A. It is a segregation by military classification only.

Q. Well, Commander, isn't it true that you of necessity, in order to accomplish the move, you have to withdraw from [fol. 724] your mass stores certain specific items to fill the requisition, don't you?

A. Yes, that's correct.

Q. All right. So at that point you of necessity at the present time or any other time have to make a segregation in order to fill the requisition, don't you?

A. On that particular requisition, yes.

Q. All right.

A. One requisition.

Q. Now, if that shipment is going to Los Angeles, under my hypothesis, that is an intrastate shipment, isn't it?

A. That one requisition normally would not go in one shipment.

Q. Let's assume, Commander, you have a requisition calling for a lot of goods all of which are going to Los Angeles for comsumption in Los Angeles, to some installation in Los Angeles. When you fill that requisition and segregate it in the fashion I have described and it is shipped to Los Angeles, that is an intrastate move, is it not?

A. From Oakland to Los Angeles, yes.

Q. All right. Now, let us assume a shipment that is going not to Los Angeles but is going to Long Beach to be loaded on a ship to some ultimate point outside of California. Now, the same process takes place in Oakland, does it not: You withdraw from the mass of goods in the ware- [fol. 725] house a certain specific lot and appropriate that to that shipment, don't you?

A. Are you speaking of one shipment now?

Q. Yes.

A. If one requisition would—represents one shipment, the procedure would be the same.

Q. Now, you know that it is an interstate——

Mr. McConnell: May it please the Court, I don't want to delay anything, but what is intrastate and interstate commerce is, of course, the opinion of an expert, a lawyer. Commander Bengtson doesn't purport to be a lawyer and is not a lawyer, and I would query whether or not these questions are proper from a layman. I don't think it makes much difference in fact, some things intrastate or interstate, but that is a conclusion.

Judge Lemmon: Sometimes laymen become very astute lawyers in certain branches.

Mr. McConnell: That is true.

Judge Lemmon: Proceed.

Mr. Phelps: Would you read the question, please?

(Record read.)

By Mr. Phelps:

Q. Now, you know that that move I have been describing is an interstate——?

A. There is a question in my mind if a ship is located in a port where the home port or home yard is at this port [fol. 726] and the vessel is destined to go to an area outside the continental limits. At that moment I am not sure whether it is intra- or interstate. If it is beyond the continental limits, I feel—I am sure it is interstate.

Q. And it is not intrastate in any event?

A. It is not intrastate if it is outside the continental limits.

Q. And not governed by any local California regulation.

A. If it is interstate traffic, no, it is not governed by California regulations.

Q. So that at the present time isn't it true, Commander, that for the traffic which is presently handled out of Oakland Supply Depot the segregation of necessity takes place any time you make a move, doesn't it?

A. Where there is any doubt as to the interstate or intrastate nature of a shipment, we utilize carriers that have both operating rights, interstate and intrastate.

Q. So that at the present time your practices require that you have some knowledge as to whether or not the shipment is interstate or intrastate in order to permit you to select the carrier with the proper operating authority, isn't that true?

A. Where we definitely know a shipment is going to Tidewater for export, we will use interstate carriers; but at the time when a shipment is consolidated, it presents a [fol. 727] legal problem, we do not know at that point definitely whether it's interstate or intrastate.

Mr. Phelps: No further questions.

Mr. McConnell: Would you mark this for identification as Plaintiff's Exhibit 2?

The Clerk: Plaintiff's Exhibit 2 for identification.

(List of naval activities referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Redirect examination.

By Mr. McConnell:

Q. Commander Bengtson, I show you here the list of naval installations marked Plaintiff's Exhibit 2 and ask you if that is a list of the installations in the State of California.

A. This is a list of naval activities and Marine Corps activities in the State of California.

Mr. McConnell: I have no further questions.

Mr. Phelps: Is that being marked for identification?

Mr. McConnell: Marked for identification 2.

Mr. Phelps: May we see it?

Mr. McConnell: It was prepared by the Judge Advocate of the Navy and similar to the list we had yesterday for the Army. You have already seen a copy of it; we sent you two copies, as a matter of fact, and asked you to stipulate with respect to the activities.

(Witness excused.)

[fol. 728] WILLIAM B. MCKINNEY called as a witness on behalf of the plaintiff; sworn.

By the Clerk:

Q. Please state your name and occupation for the record.
A. My name is William B. McKinney.

Direct examination.

By Mr. Wigger:

Q. What is your present position, Mr. McKinney?
A. I am a senior civilian assistant to the officer in charge of the Navy Central Freight Control Office.

Judge Hamlin: Keep your voice up. I can't hear you over here.
The Witness: All right, sir.

By Mr. Wigger:

Q. Will you please state your background and experience in traffic management, briefly?
A. I have had about 22 years in commercial traffic management, 17 of which were with the General Traffic Office of a railroad, five with a freight forwarding company, and the remaining 15 years have been with government, eight of which were with the Bureau of Supplies and Accounts in Washington, the remainder in my present position.
Q. How many California trucking companies, general freight companies, do you use in your operation within the State of California?
A. Approximately 20.
[fol. 729] Q. How many railroads do you use in California?
A. We use all of them.
Q. Mr. McKinney, you have heard General Lasher and Commander Bengtson testify, have you not?
A. I did.
Q. Do you agree with them that the regulation of rates by the California Commission of government property

would interfere with and hinder you in the discharge of your duties as assistant traffic control officer?

Mr. Phelps: Just a moment. I have not, perhaps, been consistent in my objections to this type of question, but I assume that the ruling would be the same on this objection as before.

Judge Lemmon: Yes. Objection overruled. You may answer.

A. Yes, I do.

By Mr. Wigger:

Q. Do you agree that it would appreciably increase the rates paid by the government for the transportation of its property?

A. Yes.

Q. Mr. McKinney, have you looked into your files for illustrations of the effect that this minimum rate schedule of the California Commission, what effect this schedule would have on the rates for the government—on the rates on government property?

[fol. 730] A. Yes. I have selected a few bills of lading covering truckload shipments that I consider to be very representative.

Q. Could you give this Court some illustration, please?

A. I have one shipment here, or bill of lading, rather, covering a truckload shipment moving from the Naval Air Station at Alameda to the Naval Air Station at North Island, California. It consisted of 148 pieces of miscellaneous material, weight 46,729 pounds, and had nine continuation sheets. The rate on that particular shipment, based upon the existing rate tender, is $271.03. Now, by rating it on the PUC minimum rate order, the charges would by $478.

And I have another shipment here moving from the Naval Supply Center at Oakland to the Long Beach Naval Shipyard. This bill of lading consisted of 31 continuation sheets, 289 miscellaneous items, weight 41,000 pounds. The cost to the government on this particular shipment on the existing rate tender is $144.41. Now, by using the mixed

route under minimum rate tender, charges would be $252.06.

Q. How much per cent increase would that have been if you had to use a minimum rate schedule?

A. On this particular shipment?

Q. This particular one.

A. 42.7 per cent.

Q. And could you tell me how much it would have been on a percentage basis on the one you just referred to before [fol. 731] this one?

A. 44.6 per cent.

Q. Can you give us another example, Mr. McKinney?

A. Yes, I have selected another bill of lading covering a movement from the Naval Air Station at North Island to the Naval Auxiliary Station at El Centro, California. This bill of lading contains six continuation sheets and 158 items. The weight is 16,000 pounds. The present cost on the rate tender is $80. Under the PUC minimum rate scale it would be $155.55, or an increase of 50.2 per cent.

Q. Were any——

Judge Hamlin: How much, Mr. McKinney?

The Witness: 50.2 per cent.

Judge Hamlin: How do you figure that, may I ask? You say the rate was $80 and the new rate is $155. Is that a 50 per cent increase?

The Witness: A slight error there.

Judge Hamlin: What?

The Witness: Must be a slight error in the percentage on that one.

Judge Hamlin: I would think so. I thought there was an error in the other one, too.

The Witness: I didn't verify the percentages.

Judge Hamlin: What?

The Witness: I didn't verify the percentages.

[fol. 732] By Mr. Wigger:

Q. Mr. McKinney, would any of these illustrations— Did any of these illustrations involve security material?

A. I don't believe any of these covered security items, no.

Q. How about the one at El Centro? Did that involve any urgent material?

A. Oh, yes, it had urgent material on it. The fact of the matter is practically all of our shipments going to El Centro are urgent. You see, that activity serves as a technical training ground for fleet air wings. They are on a tight training schedule, and it is necessary to keep all planes in operating order at all times. In fact, this particular shipment had one item, an item for an ACOG—that's for aircraft on the ground, had to be put back in operating condition.

[fol. 733] Q. Under your procedures how much time is given to the shipping activities to make a shipment of this urgent nature?

A. Very little, and when a priority A shipment is to be made, the shipping officer quite often has very little notice, and their requests for routing are normally received in our office by telephone, and that gives us very little time for rate analysis or anything of that sort.

Q. Do you frequently have these urgent shipments?

A. Yes, we do.

Q. Mr. McKinney, have you made a study to see how much increased time it would take to do the paper work in order to comply with the Commission's minimum rate classification?

A. Yes, I caused a study to be made in our office as well as one of the major shipping activities.

Q. What were the results of that study, if you will tell us briefly?

A. The report received from the shipping activity indicates that it would take them an additional 13 hours to completely describe the various items on the bill of lading for classification and rating purposes. In support of that I might explain our present method of billing under the freight all-kinds. For the rate to apply, the present rate tender, it is only necessary for the shipping activity to indicate a brief generic description of the article, chiefly for identification purposes at destination, checking with our [fol. 734] invoices. This activity reports that it takes a maximum of four hours to prepare a bill of lading of this

length, which contained 36 continuation sheets and 550 pieces, and by completely describing——

Q. How many pieces?

A. 550. Completely describing these various items to comply with the classification description, then, for rating purposes, they estimated it took 17 hours and 15 minutes, or 13 hours additional time.

Q. Do you frequently have shipments of security materiel, Mr. McKinney?

A. Yes, quite often.

Q. Can you give us a typical illustration of that sort of shipment?

A. Well, frequent shipments are made into the Naval Ordnance Test Station at Inyokern that is of a security nature. They are presently moving in a sealed van in a freight all-kinds rate.

Q. Would it be possible for you to go to the Commission and get them to approve a rate on this sort of security materiel?

A. No, it would hardly be possible to fully describe the generic description of the item to be shipped for their study of the classification and of the applicable rate.

Q. Would you have to increase your force of your rate [fol. 735] section at your Oakland Depot if this regulation went into effect?

A. In our office?

Q. Yes.

A. Yes, we would.

Q. How much would you have to increase it by, would you estimate?

A. Approximately 50 per cent.

Q. Would other naval installations under your jurisdiction also have to increase their forces, too?

A. I would assume so, based upon a study conducted by the Naval Supply Center.

Q. Are supplies shipped into Moffett Field from other naval installations in California?

A. Yes, frequent shipments are made to Moffett Field by both the Naval Air Station at North Island and Alameda, and miscellaneous material from other depots.

Mr. Wigger: That is all.

Judge Lemmon: Recess.

(Recess.)

[fol. 736] Mr. Wigger: No further direct examination.

Cross examination.

By Mr. Phelps:

Q. You stated, Mr. McKinney, in the early part of your direct that you concurred with some of the opinions expressed by witnesses who preceded you. Specifically, then, you indicated that you felt that state regulation would result in increase in the rates for government traffic.

Did I understand that that is your only— Strike that, please.

You also adverted to the matter of security and the impairment of security. Did I understand that those are the only two respects in which you feel state regulation would impede government traffic?

A. No.

Q. There are others, then?

A. Yes.

Q. Would you tell us what they are?

A. One is the delay to urgent shipments, and increased personnel.

Q. Let's take them one at a time. Delays. Will you tell us how state regulation will delay the shipments?

A. It could very well delay a shipment by having to— well, if an urgent shipment was included in one of these bills of lading with 25 or 30 continuation sheets, it could delay it a matter of 12 to 24—12 or 14 hours before the [fol. 737] shipment ever left the shipping activity.

Q. How? How?

A. By the added time and fuller describing every item on the bill of lading.

Q. Mr. McKinney, you don't mean to tell this Court that these shipments from the Navy Supply Depot in Oakland move only after the shipment has been rated, do you?

A. I do not.

Q. They move irrespective of the rate, don't they?

A. Yes.

Q. So far as time is concerned, isn't that true?

A. That is true.

Q. All right. Now, you gave us an example that you had——

Judge Carter (Interposing): Well, Mr. Phelps, the witness was making an answer to a general question in which he was enumerating the manner or ways in which state regulation would impede government traffic and you stopped him at "delay." That was the first one. Are you going to cover the other elements? He said "delay" and——

Mr. Phelps: "Security."

Judge Carter: "Security." That they weren't the only reasons. I want to hear the rest of them. I don't want to stop your questioning, but if he has anything else, I want to hear it.

Mr. Phelps: I will be very happy to hear it, too.

[fol. 738] By Mr. Phelps:

Q. We have increased cost, is that right?

A. Yes.

Q. We have delay?

A. Yes.

Q. And we have impairment of security?

A. Yes.

Q. Is there anything more?

A. No.

Q. Those are the three respects in which you think regulation will impede government traffic, is that right?

A. That is right, yes.

Q. Now, I want to turn to these examples which you have given us. The first one was a truckload routed from Alameda to North Island containing 148 pieces, 36,729 pounds, involving nine continuation sheets.

Do you have that bill of lading with you?

A. Yes.

Q. May I see it, please?

A. Sure. (Handing to Mr. Phelps)

Q. You have handed me a photostatic copy of what appears to be a United States government bill of lading No. 22258811, issued on September 9, 1954.

Am I to understand that this is a bill of lading that was prepared in your office?

A. No, we don't prepare any bills of lading.

[fol. 739] Q. Where was this bill prepared?

A. Naval Air Station, Alameda, Shipping Activity.

Q. And is that where you obtained it, this copy?

A. No, we receive copies of all bills of lading issued by the shipping activities in our assigned area.

Q. I see. So I take it that this is a bill of lading reflecting an actual movement, is that right?

A. Yes.

Q. That took place on the date indicated?

A. Yes.

Q. All right. Now, I notice that there is a top page containing the bill of lading number, and this appears to be a standard form No. 1103, form approved by controller general, United States.

And I note that annexed to the top sheet there are a number of additional sheets called "United States Government bill of lading, memorandum and continuation sheet."

It is true, is it not, Mr. McKinney, that these continuation sheets are a part of the bill of lading.

A. Yes, it is.

Q. Now, I am going to ask you some questions, and perhaps you can answer them more quickly than I can by looking at the document. (Handing to witness)

I would like to ask you to tell us—well, strike that.

First of all, who did the rerating of that shipment? By [fol. 740] "rerating" I mean the calculation of the charge under the minimum rate No. 2—Commission's Minimum Rate Order No. 2.

A. One of the rate men in our office.

Q. Was it done under your direction and supervision?

A. Under my request, yes.

Q. Are you familiar with the steps that were taken in arriving at that rerating?

A. Fairly so.

Q. All right. First of all, I want you to tell us the distance that was used.

A. The constructive mileage is—I believe the constructive mileage between Alameda and San Diego is 579 miles.

and the constructive mileage was used, and I think that is the figure.

[fol. 741] Q. 579 miles. All right. Now, I will ask you what weight bracket was used.

A. Well, all items on the bill of lading were classified and put into their respective weight brackets. In this case we have first class, third, fourth, fifth and A, weights in each bracket.

Q. Tell us the weights for each of those brackets.

A. 826 pounds at one and a quarter of first class; 1258 pounds, first class; 9,378 pounds of third class; 25,593 pounds of fourth class; 7,257 pounds, class five; and 2,422 pounds of class A, total weight 46,729 pounds.

Q. Now, with respect to the commodities, were those grouped in any way in classes? I think you already indicated they were. Will you tell us those classes again, please?

A. I didn't quite understand that question.

Q. The grouping of the commodities in classes, have you already told us the classes you had used for grouping these commodities?

A. Yes.

Q. Did you use any l.c.l. rates at all?

A. No.

Q. Did you use any rail rates?

A. I believe on the 826 pounds rail rates were used. I am not positive; I didn't go over each item in detail with the rate man.

[fol. 742] Q. I should like to know, Mr. McKinney, either from you or from your assistants who can tell us the answer—I should like to know what, if any, rail rates you made use of. Can you tell us?

A. No.

Q. Exactly?

A. I don't know exactly on each one.

Q. You are familiar with the fact, are you not, that the minimum rate order No. 2 promulgated by the Commission of California makes it possible for a motor carrier to meet a rail rate; you are familiar with that, aren't you?

A. That's right.

Q. It is called an alternative rail rate application?

A. That's right.

Q. So that in order to arrive at your minimum rate you have always got to ascertain, have you not, whether or not the rails in their tariffs provide a rate between the points you are interested in that will produce a lower rate than otherwise; isn't that true?

A. That's true.

Mr. Phelps: I should like to have an opportunity to check this, Your Honors, because we are missing, I think, one essential item; that is, what, if any, rail rates were used. That's an essential factor here. If counsel can supply us with that informally, I think we can proceed, but I [fol. 743] should like to have it understood.

Judge Lemmon: He indicates that he can.

Mr. Phelps: Very well.

Q. Now, let us take the second example, the Oakland to Long Beach shipyard which you gave us.

May I have the first one back, please, in the meantime?

May I have it just a moment, please? You have handed me in support of the second example which you gave us in your direct, United States Government bill of lading No. 8270211, I believe; it isn't altogether clear on the photostat. Can we accept 8270211, counsel?

Mr. McConnell: Yes.

By Mr. Phelps:

Q. Dated September 22, 1955 as the date of issue. Are we to understand, Mr. McKinney, that this also is an actual bill of lading reflecting an actual shipment that took place?

A. That is true.

Q. Now, I will ask you to answer the same questions with respect to that one as we had on the first one. First, the distance used.

A. This again, the constructive mileage was used, which I believe to be 472 miles between Oakland and Long Beach.

Q. Now, the weight brackets and classes.

A. We have just four pounds of first class rate; 106 pounds of 77½ per cent of first; 1805 pounds of second

[fol. 744] class; 9,066 pounds of third class; 10,786 pounds of fourth class; 6,146 pounds of Class A; 12,166 pounds of fifth class; 1180 pounds of Class E.

Q. Does that complete your enumeration?

A. That is true.

Q. Did you use any l.c.l. rates at all?

A. No, not to my knowledge.

Q. Did you use any rates—any rail rates, if you know?

A. There again I don't know, but our rate people are thoroughly familiar with the alternative clause.

Mr. Phelps: We may have that, too, counsel?

Mr. McConnell: Yes.

By Mr. Phelps:

Q. Let us take the third example, which appears to be quite clear, bill of lading No. N-31013319, issued May 3, 1955. I assume this likewise reflects an actual shipment?

A. Yes, sir.

Q. Now, the same information, please. First, the destination. Pardon me. First, the distance.

A. 159 miles was used in basing this between North Island and El Centro.

Q. Now, the classes by weight brackets—classes and weight brackets.

A. 3,787 pounds of double first; 65 pounds of one and a half times first; 5400 pounds of first class; 775 pounds of [fol. 745] second class; 2,087 pounds of third class; 3,696 pounds of fourth class. Total, 15,810 pounds.

Q. No l.c.l. rates?

A. Not to my knowledge.

Q. And I take it that with respect to the railroads we referred to——

The Witness: That is true.

Mr. Phelps: That can be supplied.

Q. Now, I would like to refer to this time study a little more fully. Could you tell us the shipping facility once more where this time study was made?

A. Naval Supply Center, Oakland.

Q Is that your office?

A. We are merely located at Oakland; we are not a part of it.

Q. Naval Supply Center, Oakland?

A. That's right.

Q. Did you participate in this time study?

A. I did not, no.

Q. Who did, Mr. Ragain, whose name appears on that memorandum?

A. He is the supervisor of the shipping section, Naval Supply Center, Oakland.

Q. That memorandum, together with the bill of lading, was forwarded to your superiors, is that right?

[fol. 746] A. That's right.

Q. This study, as I understand it, involves a single bill of lading?

A. That's true.

Q. No. N-17988945, is that right?

A. That's correct.

Q. In two parts, is that right?

A. No, the time study on that was—the bill of lading was prepared for shipment under the existing conditions. Then we had him fully describe the items on the bill of lading as though we had to apply the minimum rate order, the same bill of lading.

Q. I see. So that in order to arrive at the number of items that were contained in this single bill of lading, we add 218 plus 226, do we not, which is 544, is that right?

A. No, I don't—you see, this is the way the bill of lading was initially prepared for shipment: This has gone forward.

Q. I see.

A. Then we had him go back and take the same bill of lading, same number of pieces, and fully describe it for rating purposes.

Q. I see. Now, will you tell me what is the number of items that moved under the bill of lading covering the actual movement as it went forward?

[fol. 747] A. That is a different commodity item, I take it.

Q. I don't know; I am asking you. I would like to have you tell me, if you can, what was the number of items that

appeared on the bill of lading when it was first prepared and issued and under which the shipment actually moved.

A. This line item here means how many entries on the bill of lading. 260 separate entries on the bill of lading as it went forward.

Q. 260 items?

A. 218.

Q. 218 items. All right.

A. And it took 226 line items, or two or three additional continuation sheets to fully describe the shipment.

Q. I see. But you began with 218 items as part of the original bill, is that right?

A. The bill of lading covering the shipment as it went forward had 218 line items, yes.

Mr. Phelps: May I have Your Honors' indulgence a moment to confer with my associates?

Judge Lemmon: You may.

[fol. 748] By Mr. Phelps:

Q. Mr. McKinney, I am going to refer you to bill of lading No. 8270211, and call to your attention on sheet No. 11, as well as on the other sheets that I see here at random—I pick sheet 11 at random—over on the righthand side of the page certain pencilled notations, and ask you what those are.

A. Oh, that is—I guess I better explain what happened to these bills of lading.

These bills of lading are coded for statistical purposes and drawn off on IBM reports, and those indications there are merely statistical quoting references.

Q. Do those show or are they intended to show classes?

A. No, merely a commodity grouping.

Q. I am referring now to the circled numbers of 4, 4, 2, 2 and so on.

A. But these particular commodities take the same grouping as far as our statistics are concerned.

Q. Well, now, you haven't quite answered my question. I am referring now to these numbers over on the righthand side that are circled. I would like to know what those numbers indicate. 4, 2, 2, I see on this page.

A. What that is?

Q. Yes. Don't those show the classes?

A. Those show the classes, yes.

Q. Isn't it true when you set out to compare the rate [fol. 749] calculated under your special tender or tenders as compared with the rate calculated under minimum rate order No. 2 of the Commission, that you first took these bills of lading and had set off on the side here the class into which each of these commodities fell, did you not?

A. Yes.

Q. Now, I see—I am referring still to bill of lading No. 8270211—the memorandum attached to it on the front—oh, I've got the wrong one.

I should have called your attention, Mr. McKinney, to bill of lading No. 22258811. I note again, however, that on all of the continuation sheets that there are these same numbers in circles, and I take it those also reflect the class of the items indicated, is that right?

A. I assume that to be correct.

Q. Now, I notice on the memorandum that accompanies this bill of lading, at the bottom of the page it says, "Minimum hours spent in rating, 25 minutes." I take it that that took someone only 25 minutes to rate the shipment contained on this bill of lading No. N-22258811, is that right?

A. Well, I suppose that to be correct, according to the memorandum.

Q. Now, I will refer you to bill of lading No. 31013319, and the memorandum attached to this bill of lading has towards the bottom, "Man hours spent in classification, [fol. 750] NCFCO,"—I take it that means Naval Central Freight Control Office—"10 minutes." Another "Man hours spent in rating and extending, 10 minutes."

A. Yes.

Q. Another quote, "Man hours spent in evaluating, 20 minutes," and 10 plus 10 plus 20 equal 40 minutes to classify, rate, extend and evaluate, is that right?

A. Yes, that is correct.

Q. What is meant by the term "evaluating" in that context?

A. I would assume that it was determining the rates for those various classes.

Judge Carter: I presume that is under the present system? That is, when I say "the present system," the system without regard to whether or not the California law would be in force.

A. Well, under the present system, why, the rate is known. It is on a truckload minimum.

Judge Carter: No, but what are these figures for? Are they the figures that just relate to the man hours used if a shipment were to be carried out without regard to the California law, or with regard to the California law?

A. With regard to California law.

Judge Carter: In other words, that would be what would be required under the California law if it were in effect?

A. Yes, sir.

[fol. 751] Judge Carter: All right; that is all.

By Mr. Phelps:

Q. Well, you did that very thing, didn't you, Mr. McKinney, or somebody under your direction? In conducting this experiment to get this rate comparison, you did take the actual bills of lading and have someone classify them and rate them under the minimum rate order No. 2, didn't you?

A. That's right.

Q. And it took these periods of time that were described, 40 minutes and 25 minutes, to do the job, didn't it?

A. That's on the small shipment, yes.

Q. Well, now, in the light of those examples, Mr. McKinney, isn't it outrageous and unreasonable for us to believe that it took anybody 13 hours to rate this one that resulted in your estimate of the time needed to rate these bills?

A. That 13 hours is not based on rating. It is describing each item contained on the bill of lading. That memorandum from Mr. Ragain has nothing to do with rates.

Q. Well, as I understand that memorandum; it is purporting to describe what was done and what would have to be done in order to rate these shipments under minimum rate order No. 2, isn't that right?

A. That is, in order for our office as well as the carrier to determine the going rate, yes.

Q. Now, that's precisely what you were doing in these [fol. 752] three examples, isn't it?

A. It is.

Q. All right.

Judge Carter: May I ask you this question, Mr. McKinney: Is the information that is on the bills of lading which have not been reclassified in accordance with Order No. 2, is the information sufficient for you to rate in accordance with Order No. 2?

A. Well, under the present system it is not necessary for us to rate each item.

Judge Carter: I understand.

A. We have one going rate for the entire truckload. But under the PUC Minimum Rate Order we would have to determine the classification of each item shipped.

Judge Carter: But in questioning by counsel you indicated that you were able to do that, that is, follow minimum rate order No. 2, without reclassification?

A. On some of these smaller shipments, that is true, yes. But on the heavy shipping activities like in Naval Supply Center, Oakland, they make no attempt to go beyond just a brief generic description like "bolts," "knives," "machinery." That is as far as they go, just the item for identification purposes at destination.

Judge Carter: And I take it that would not be sufficient for rating under Minimum Rate Order No. 2?

[fol. 753] A. No, sir, it would not.

Judge Carter: All right. Any further questions in view of the questions the Court asked?

Mr. Phelps: Yes, one or two more. I don't think it will be necessary for my purposes to offer these documents in evidence, but I should like to have the record show a little more completely the data appearing upon these bills of lading that have been used.

I refer now to United States Government bill of lading N17988945.

Judge Lemmon: Did you offer those?

Mr. Phelps: No, I do not, Your Honor. This was issued 29 February 1956, from Oakland, California, as the shipping point, more specifically "FTD."

Q. What does that mean, Mr. McKinney?

A. Freight Terminal Department, Naval Supply Center, Oakland.

Mr. Phelps: The carrier was Allstate Transportation Co., Inc. The consignee was the Receiving Officer, Naval Repair Facility, foot of 32nd Street, Building 115, San Diego, California.

Bill of lading No. 31013319, issued May 3, 1955, from North Island, California, to SO. Is that Senior Officer?

The Witness: Supply Officer.

Mr. Phelps: Supply Officer, Naval Air Station. Shipped [fol. 754] by A. B. James Freight Line, is that right?

A. Right.

Mr. Phelps: The consignee is the Receiving Officer, Naval Auxiliary Air Station, El Centro, California.

Judge Carter: North Island is in San Diego, isn't it?

The Witness: A. Yes, that is right.

Mr. Phelps: No. 8270211, issued September 22nd, 1955, from Oakland, California, specifically FTD, Naval Supply Center. Carrier was Allstate Transportation Co., Inc. Consignee, Receiving Officer, Long Beach Naval Shipyard, Building 53, Long Beach, California.

Did I return to you one of those, Mr. McKinney?

The Witness: No, sir, you have all three of them—four of them.

Mr. Phelps: Another is bill of lading No. N22258811, issued September 9, 1954, from Alameda, California, by Allstate Transportation Co., Inc., consigned to Receiving Officer, Naval Air Station, North Island, California.

Q. Now I will ask you one or two more questions, Mr. McKinney: Were these bills selected at random or was there some method in selecting these particular ones?

A. No, just selected at random.

Q. I notice one of them, Mr. McKinney, the last one, No. N22258811, was issued September 9th, 1954. How did you [fol. 755] happen to go back to 1954?

A. In checking, we didn't notice the date on the bills. That is one that was readily available from our completed records.

Mr. Phelps: No further questions.

Judge Lemmon: Take the noon recess.

(Whereupon an adjournment was taken to 2:00 o'clock p.m. this date.)

[fol. 756] Wednesday Afternoon Session, March 21, 1956, 2:00

(Four documents were marked, respectively, Plaintiff's Exhibits No. 3, 4, 5, and 6 for identification.)

Mr. Phelps: May we have some description of those, counsel?

Judge Carter: These are what we were discussing this morning?

Mr. Wigger: Yes, and I will make that clear.

Judge Carter: Will you give the numbers of the ones that have been marked for identification? What is Exhibit 3?

Mr. Wigger: I will start with the first one. Each one of these first three exhibits have bill of lading numbers.

Judge Lemmon: Those numbers were mentioned in the examination of the witness.

Mr. Wigger: I will point that out now.

Government's Exhibit for identification No. 3 is bill of lading No. 22258811.

Government's Exhibit for identification No. 4 is bill of lading No. 8270211.

Government's Exhibit for identification No. 5 is bill of lading No. 31013319.

Government's Exhibit for identification No. 6 is the time study that was referred to.

REDIRECT

By Mr. Wigger:

Q. Mr. McKinney, during your testimony today on direct [fol. 757] you gave an example of the time study that was conducted in a shipping activity to determine how much additional time would have been required if the minimum rate had been in effect. You stated that your example revealed 13 additional hours at the shipping activity, is that right?

A. That is correct.

Q. Will you now explain in what manner this time would have been consumed at the shipping activity, this additional time?

A. It required this additional time in research of the requisitions as they were being filled to determine the type of material of which the material is made, whether brass, bronze, wood or what not, and to convert Navy nomenclature into the proper classification description.

In a good many instances these invoices do not contain that information—the requisitions, rather, do not contain this information—and they have to go back to research the invoices, and depending upon the number of continuation sheets, why, it requires additional typing in order to fully describe each item in accordance with the requirements of the consolidated freight classification for rating purposes.

Q. During all of these additional 13 hours required for this additional work, that shipment would still remain on [fol. 758] the shipping activity floor, would it not?

A. That is right, yes.

Q. After the shipping activity had completed this task, which you testified takes 13 additional hours in this example, then, what would they have done?

A. They have merely described the material——

Q. I am afraid you did not get my question or my question was not clear. Let me put it this way: After they had taken these 13 hours in performing this task——

A. Yes.

Q. Would they then have contacted your office to get the route?

A. Oh, yes. Then they contact our office for routing instructions.

Judge Carter: Mr. Wigger, you are talking about 13 hours. You really mean 13 man hours, do you not?

Mr. Wigger: That is right: 13 additional hours on the shipping floor, man hours.

Judge Carter: There is a difference between hours, consecutive hours and man hours.

By Mr. Wigger:

Q. Those 13 hours are man hours?

A. That is right, yes.

Q. After that time had elapsed, you say they would then have contacted your office, is that right?

A. That is right.

[fol. 759] Q. What do you do now when a request for routing instructions comes in from the shipping activity?

A. Under the present arrangement?

Q. Yes, under the present arrangement.

A. We merely select a carrier that has freight all-kinds rate on file.

Q. What would be required to do if the minimum rate were in effect?

A. We would have to classify each item appearing on this—at the shipping activity as proffered for shipment, classify and rate it, and make a determination of the carrier selected.

Judge Carter: You said minimum rate. I assume you mean No. 2.

Mr. Wigger: Minimum rate No. 2, yes.

Judge Carter: I just want to be sure because I didn't know. There are other minimum rate possibilities, aren't there?

By Mr. Wigger:

Q. How long on an average would you say this task would require in your office?

A. On an average of from two to four hours.

Q. If the minimum rate No. 2 were in effect, would you

have to do this rating and classifying before you could give routing instructions to the shipping activity?

A. That is right.

[fol. 760] Q. Could the shipment move before you gave such a routing instruction to the shipping activity?

A. Normally, no.

Q. Under the present system, after you received a request from a shipping activity, you give them a route release, do you not?

A. That is right, yes.

Q. Referring to Government Exhibit No. 5 for identification, could you explain why it took you 40 minutes to classify this particular bill of lading?

A. Well, there are only a few items involved in this shipment, and they are sufficiently described for ready classification and reading, a good many of them having the same classification rating.

Q. Referring to Government Exhibits 3 and 4 for identification, I direct your attention to circled numbers on the righthand column of certain of the pages in these exhibits, which numbers were referred to on cross examination, and ask you what are those numbers.

A. They are the classification ratings assigned by our rate man in making this study.

Q. Then those numbers were put on those bills of lading only for this specific study you made?

A. That is right.

Q. Mr. McKinney, during the course of your testimony [fol. 761] you referred to these continuation sheets which are attached to the bill of lading. Are these continuation sheets required by state or federal law or regulations to be a part of the bill of lading?

A. No.

Q. They are put on for the government's convenience, is that right?

A. That is true.

Q. On cross examination counsel asked with respect to these three bills of lading whether rail rates were used in computing the total charges that would have been assessed on the government property if Minimum Rate No.

2 had been in effect. During the noon recess did you find out if rail rates were used?

A. I did.

Q. Were they used or were they not used?

A. No, they were not used.

Q. Could you tell us why they were not used?

A. Our experience has been that generally there has been very little difference in the rails v. the truck rates on shipments of this nature and had we used rail rates in addition to our truck analysis, it would only lengthen the time of the study.

Mr. Wigger: The United States now offers in evidence Government's Exhibits for identification No. 3.

[fol. 762] Judge Lemmon: If there is no objection, it will be received.

Mr. Phelps: I should like to inquire of counsel its purpose in offering that exhibit.

Mr. Wigger: The purpose in making this offer is that you went into some detail questions concerning these exhibits, referred to certain statements therein, and we think that in connection with those questions, those excerpts that you made, that it should be part of the record.

Judge Lemmon: The testimony went in without objection, and it would seem to me that the exhibits would be of help to complete the testimony.

Mr. Phelps: With that representation as to the purpose, I have no objection, Your Honor.

Mr. Wigger: The government now offers in evidence Government's Exhibit for identification No. 4.

Judge Hamlin: Are you going to offer more?

Mr. Wigger: Just 4, 5 and 6.

Judge Hamlin: And why don't you offer them at the same time?

Mr. Wigger: All right; 5 and Government's Exhibits No. 6.

The Clerk: Plaintiff's Exhibits 4, 5 and 6 in evidence.

Judge Lemmon: They may be received.

[fol. 763] (Whereupon Plaintiff's Exhibits No. 3, 4, 5 and 6 for identification were received in evidence.)

Mr. Wigger: That is all.

Recross examination.

By Mr. Phelps:

Q. A few questions, if I may. Mr. McKinney, after referring to this 13 hours to be consumed in classifying these shipments under state regulation, you stated that the shipment would remain on the floor during this time, did you not?

A. That is correct.

Q. Now, isn't it true for the great majority of your shipments, time is not important anyway?

A. No, time is very important on a good many of our shipments.

Q. In those cases where the shipment is urgent, under those circumstances you would not allow the shipment to remain for 13 hours, would you?

A. No, not in every case; no.

Q. You would ship it out first and segregate the rate later, wouldn't you?

A. We could take out these urgent items and ship them and hold the remainder.

Q. So that for those shipments with respect to which time is of the essence, the rating process is not permitted in your present practice or contemplated practice, to hold [fol. 764] back a shipment, is it?

A. Generally speaking, no.

Q. Now, referring to Exhibit 5, you took only 40 minutes to rate and classify that shipment because it only contained a few items in it that were easily described. Isn't it a fact, Mr. McKinney, that you have many, many f.a.k. shipments that have only a few items in them?

A. No, I wouldn't say we had many, many. Most of them have considerable number of items.

Q. What is your idea as to the average number of items in your f.a.k. shipments?

A. I would say approximately close to a hundred.

Q. A hundred. Then you would feel that this bill of lading 6 that contains some 218 items is well above the average, would you not?

A. Those are pieces; they are not different items.

Q. Is there a difference?

A. There is.

Q. Tell us what the difference is.

A. You might have 20 boxes there of one particular item.

Q. Is it your understanding that bill of lading No. 6 is a description of pieces?

A. On the cover sheet it is the number of pieces, yes.

Mr. Phelps: May I have Exhibit 6, please?

Q. Showing you Exhibit 6, Mr. McKinney, and calling [fol. 765] your attention to the column at the extreme left of the page, that shows number of packages?

A. Yes.

Q. Is it your understanding that the figure 218 line items refers to the number of pieces rather than items?

A. No, it is not. The number of pieces is indicated on the cover sheet here as 500. 216 are the number of line items indicated in here.

Q. I see. Then if this shipment contains 216 line items, that is still well above the average of the number of items, is it not, contained in your f.a.k. shipments?

A. Not necessarily, for you might have several different listings of this same type of material in here. You might have 216 line items, but only approximately 100 different items. The same type of material can appear more than once on a bill of lading.

Q. I understand that, Mr. McKinney, but didn't you tell us a moment ago that in your opinion the average number of f.a.k. shipments—the average f.a.k. shipment had approximately 100 items in it?

A. Different items, yes.

Q. That was your testimony a moment ago, wasn't it?

A. Yes.

Q. Now, having in mind Exhibit No. 6, which shows 218 items, I ask you once more: Isn't Exhibit No. 6 a shipment [fol. 766] which is not representative of your average? Isn't that true?

A. Well, perhaps I haven't made myself clear. Each appearance on this bill of lading doesn't mean a separate item—I mean, a separate classification item. It's a separate entry on the bill of lading, yes, but the same description, like medical stores, can appear more than once on this bill of lading.

Q. Are you telling us now in the memorandum which is the top sheet of Exhibit No. 6 that the word "item" doesn't mean "item"?

A. I take it to mean that many different entries on the bill of lading.

Q. I shan't debate the point much longer, Mr. McKinney, but you told us that it shows also 550 pieces.

A. Yes.

Q. But the memorandum on the front page shows 218 items. Now, I will ask you once more: In your opinion, isn't that Exhibit 6 unrepresentative—is it not unrepresentative of your f.a.k. shipments?

A. It is representative of shipments moving out of the Naval Supply Center, Oakland, yes.

Q. All right.

Mr. Phelps: No further questions.

Judge Lemmon: That's all.

[fol. 767] The Witness: Thank you.

(Witness excused.)

[fol. 768] Judge Lemmon: The Court would like to inquire of counsel for the plaintiff if taking of testimony on behalf of the plaintiff couldn't be speeded up? Probably you are coming down to a little corroborating evidence.

Mr. McConnell: Our plan is to corroborate it, and our plan was, in this military supply thing it seems that there are different facets from the standpoint of each service. I noticed as I have been noticing in the transcript, on direct examination we are trying to keep each witness within at least 15 or 20 minutes.

I think if you would look at the time consumed on direct examination, it hasn't been completely—But we will speed it up considerably. We do think we have certain things of interest that are developed in other parts of the service, and we will go through them very rapidly.

Colonel Eastham.

COLONEL WALTER H. EASTHAM, called as a witness on behalf of the plaintiff; sworn.

The Clerk: State your name and rank for the Court.

A. Walter H. Eastham—spelled E-a-s-t-h-a-m. Lieutenant Colonel, United States Marine Corps.

Direct examination.

By Mr. McConnell:

Q. What is your present position in the Marine Corps, Colonel Eastham?

[fol. 769] A. My present position is officer in charge, Marine Corps Fleet Control Office, San Francisco.

Q. Would you kindly state very briefly your background and experience in Marine Corps transportation?

A. I have served continuously in the Marine Corps since 1927, entering the field of supplies in 1932. Between 1932 and 1939 my transportation experience was incidental to supply work.

From 1939 until the present time, with the exception of periods during World War II, I have been engaged almost exclusively in transportation. From the latter part of 1949 through mid-1953 I was assistant officer in charge of the Transportation Section, Headquarters, Marine Corps, Washington, D.C.

I came from Washington to San Francisco as a freight transportation officer at the Marine Corps Depot of Supplies, San Francisco, and in 1954 established the present office of which I am officer in charge.

Q. Will you explain the responsibility of that office?

A. The Marine Corps Freight Control Office is a field office of headquarters, Marine Corps; and I am responsible for the exercise of traffic management to all Marine Corps shipments made within the eight Western states, which comprise the eleventh, twelfth and thirteenth Naval Districts.

Q. What are some of the most important installations in [fol. 770] your assigned area over which you exercise traffic control?

A. The main supply depot and its annex is the Marine Corps Supply Center at Barstow, actually located at Nebo,

West Jermo, and Mineola, where they supply the annex located in San Francisco.

These depots serve in interchange supplies with Camp Pendleton at Oceanside, recruit depot at San Diego, the amphibious training base at Coronado, Marine Corps Training Center at 29 Palms, the cold weather training battalion at Pickle Meadows near Bridgeport, Marine Corps Air Station at El Toro, Marine Barracks at various Navy yards, Navy and Army depots and activities, as well as contractors, warehouses in the states of Washington, Utah, Nevada and California.

Q. You state that prior to this office you served as assistant transportation officer at Headquarters, Marine Corps?

A. For almost four years, sir.

Q. Speaking generally, Colonel Eastham, what is the mission of the Marine Corps?

A. The mission of the Marine Corps is to maintain three combat divisions and three marine air wings in a high state of readiness.

Now, with the Court's permission, I would like to quote from an affidavit which I have in front of me of Quarter- [fol. 771] master General of the Marine Corps, Major General R. A. Anderson, in which he gives forth the principal mission of the Marine Corps.

> "The principal mission of the Marine Corps is that of being the country's primary and principal amphibious striking force for the seizing and holding of advance bases. To fulfill this mission the Marine Corps must engage in continuous training to keep in combat readiness. The Marine Corps is likewise charged by law with responsibility for the leadership and development of tactics and techniques in amphibious warfare for all the armed services of the United States.
>
> "The Marine Corps is divided roughly into two halves: The Fleet Marine Force, Atlantic and the Fleet Marine Force, Pacific. They are the striking forces in the named directions. On the east coast the Marine recruit starts at Parris Island, goes to Camp Lejeune for advanced Infantry and Amphibious training and a few go on to Marine Corps air stations.

"On the west coast the recruit starts at the Recruit Depot, San Diego, goes to Camp Pendleton for advanced Infantry and Amphibious training and some continue to Marine Corps air stations such as El Toro [fol. 772] at Santa Ana, California.

"Camp Pendleton is an amphibious training base. It is the largest in the world covering 134,000 acres. It has varied terrain and ocean with various types of, beaches. There are many types of inland terrain varying from desert to mountainous conditions. This is supplemented by desert training at 29 Palms and by cold weather training at Pickle Meadows near Sonora Pass.

"In addition to the foregoing training facilities, the Marine Corps has a central school at the Marine Corps Schools at Quantico, Virginia. It has a manufacturing depot in Philadelphia, Pennsylvania, Supply Depots at Albany, Georgia and Barstow, California and Forwarding Depots at Norfolk, Virginia and San Francisco, California.

"On the west coast the Marine Corps Supply center at Barstow, California is the principal supply source for all Marine Corps forces west of the Mississippi River including the Fleet Marine Forces overseas in areas normally supplied from the west coast.

"In addition to maintaining current operating levels——"

By Mr. McConnell:

Q. I think, Colonel, since the Court is trying to press for-
[fol. 773] ward, I think that gives us a sufficient picture.

A. I have the original here should the Court desire to have that placed in evidence.

Q. As I take it, the main purpose or main mission of the Marine Corps is to keep two or three combat divisions in a state of combat readiness?

A. That is right.

[fol. 774] Q. They must be ready to move out on short notice, is that correct?

A. Yes, sir.

Q. Does the nature of the mission affect the problems of transportation in any degree?

A. Definitely. Our supply must be flexible and from a transportation standpoint we must have a speedy system for arranging for transportation in order to maintain our troops in a high state of readiness.

Q. Could you explain very briefly the supply lines of the Marine Corps, just using the pointer there?

A. The Marine Corps is divided actually by the Mississippi River from its supply missions. On the East Coast Albany, Georgia is the main supply center, with a forwarding annex at Norfolk. Georgia Depot in turn supplies all Marine Corps installations and activities east of the Mississippi from New Orleans, Florida and up to Maine. Of course, our principal activities are Paris Island, Camp Lejeune, North Carolina, the Marine Corps Air Station at Cherry Point, the Marine Corps School at Quantico, the Clothing Depot at Philadelphia, and then various activities in Navy Yards up and down the Coast.

Q. There is a division station at Camp Lejeune?

A. Yes, sir, that is the home station of a division.

Q. Will you explain briefly the setup on the West Coast? [fol. 775] A. On the West Coast it is somewhat different in that our main depot is located at Barstow and our forwarding annex at San Francisco. From there our major installations are located within the State of California: Camp Pendleton, San Diego, amphibious base, Coronado, Twenty Nine Palms, the Cold Weather Treating Battalion at Sonora Pass, and then we have, of course, posts and stations. We have marine barracks at all the navy yards on the West Coast.

Q. Colonel Eastham, I take it you have two main depots, Albany Depot on the East Coast, Barstow Depot on the West Coast. Can you explain briefly how those two sites were selected and the reason that they were selected?

A. Yes, sir. Actually the reason that Barstow was selected, I am not fully aware of. That was selected during the war.

Q. Where were the two main marine depots prior to World War I?

A. Oh, prior to World War I?

Q. I mean prior to World War II. Excuse me.

A. Prior to World War II we had two main depots, on the

West Coast at San Francisco, which is now the forwarding annex, and on the East Coast it was at Philadelphia, now our clothing repair or clothing manufacturing depot.

Q. When did they draw the principal depots back from the ports to the interior?

A. After World War II started it was necessary to ex- [fol. 776] pand our supply facilities, of course, to bring them back away from port congestion for overseas shipment, to get them away from population congestion and to have a backup area that could support not just the one port like San Francisco and Philadelphia used to do, but to be able to funnel the supplies through any number of ports.

Q. Did the problem of protecting materiel from attack or anything of that sort enter into it?

A. Oh, definitely. That is part of our dispersal program. You mentioned site selection.

Q. I do not think how you selected the particular sites we are concerned with, but they were drawn back as part of the dispersal program?

A. That is right.

Q. And they were drawn back because they had ready access to the ports which they had to serve?

A. Yes, sir. Like Barstow, for instance, has two major transcontinental railroads serving it. It has a good highway network that is readily accessible not only to San Francisco, which is further away, but to all Southern California ports.

Q. Does materiel come into these two depots from all over the country?

A. Yes, sir.

Q. Do you have any idea of the amount of material at [fol. 777] Barstow that originates outside of California?

A. Certainly, most of the material presently in storage at Barstow originated from without the State.

Q. What about in Georgia? What percentage of it over there in Albany?

A. Almost without exception in Georgia the material originated without the State. I can not think of anything except maybe a little fresh fruits and vegetables used by the marine station there that would have come from within Georgia.

Q. Just very quickly will you trace a typical piece of marine equipment through the supply channels?

A. Well, we will take a jeep procured in Toledo. It would come out to San Francisco, to the San Francisco Electronics Section, and the Electronic Depot and Base would install a radio communications set. The jeep would no longer be a jeep but would then be a self-propelled radio communication set. It would probably be placed in a cocoon and weatherized. It might then be sent to Barstow for storage. From Barstow it may be sent to M.U.F., to a unit embarking for overseas, to Camp Pendleton, from Camp Pendleton to San Diego overseas. Like during Korea. After a unit of equipment became worn out, it would be returned. It might come into Port Hueneme, from Port Hueneme it would come to San Francisco for rehabilitation or complete overhaul, [fol. 778] and it might then be reissued to another unit for training purposes.

Q. Colonel Eastham, you heard the previous testimony?

A. Yes.

Q. Do you agree that the imposition of the minimum rate classification, the California Public Utility Commission regulation of rates for the shipment of Marine Corps materiel, would severely hamper and hinder you in carrying on your duties?

Mr. Phelps: Same objections, Your Honors.

Judge Lemmon: Overruled.

A. Yes, sir, I definitely feel, of my own opinion, that in complying——

Q. First, you say you do.

A. Yes, sir, I do.

Q. Will you explain it, then?

A. To begin with, it would require a slowdown in our movement of freight. It would cause, as has been explained here, time after time, that the classification would be required. Since our traffic is very unique and different, we have to ship many thousands of different items and in many different directions, and itemwise our IBM stock records indicate that we have approximately 450,000 items in our stock system, control system, that is used to ship to the various activities.

[fol. 779] We have to make, since our flow of traffic, as I say, our flow of traffic, there is no positive flow of traffic, is in many different directions, the commodities are very difficult to be continually classified under one group of commodities, they are all different, there is an admixture. If we have an emergency shipment it would require us to pay, in my opinion, a higher charge, and all in all I just think it would cause us considerable inconvenience all the way through.

Q. Would it increase the cost of your freight bill?

A. Yes, sir.

Q. Do you ship secret material under your supervision?

A. Yes, sir.

Q. Would this kind of regulation interfere with those shipments?

A. Insofar as the classification of equipment, or a requirement for going before the Commission and explaining the type of equipment, it definitely would.

Q. As far as the Marine Corps is concerned, if all the 48 states started regulating the movement of government property, your situation would be one thing on one coast and the other thing on the other, wouldn't it?

A. Oh, yes, sir, because our shipments from Georgia, to and from Georgia, are almost exclusively interstate, whereas shipments to and from the Barstow Supply Depot to and [fol. 780] from military installations is almost all intrastate in appearance.

Now, the intent in back of it, there may be a lot of it that is interstate because of our transit authorities which have been established at Barstow. But from point to point it would be within the state.

Q. It would be sort of a lopsided logistical picture for the Marine Corps, a hodgepodge?

A. Yes, sir.

Q. Will you have any difficulty distinguishing between interstate and intrastate materiel?

A. We always have difficulty in that. However, it is our policy that where there is any question as to whether it is interstate or intrastate we attempt to get carriers that have both rights, even though the charge is greater.

Q. And with this flow through Barstow, it would be very

difficult to try to isolate intrastate from interstate for rate making?

A. Yes, sir, we have large—we try to consolidate—in fact, most of our truck shipments hit between 36 and 40 thousand pounds. We do that not only to consolidate, but also to help the carrier get a good pay load in his truck.

Mr. McConnell: I have no further questions. Thanks.

Mr. Phelps: No questions.

Judge Lemmon: That's all.

(Witness excused.)

[fol. 781] Mr. Wigger: Mr. Stallings.

H. C. Stallings, called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name and occupation for the record.

The Witness: H. C. Stallings, S-t-a-l-l-i-n-g-s.

Direct examination.

By Mr. Wigger:

Q. What is your present position, please?

A. I'm the senior civilian transportation officer for the Marine Corps Freight Control Office, San Francisco.

Q. And you are Colonel Eastham's principal assistant?

A. Yes, sir.

Q. What has been your background experience, just briefly?

A. I spent twelve years with the Missouri Pacific Railroad in San Francisco in freight traffic matters; approximately fourteen years with the Marine Corps in San Francisco in freight transportation.

Q. Mr. Stallings, at the request of the Court we are trying to cut this testimony down as much as possible, so will you just give a few examples of the effect, specific effect of the minimum rate schedule on your shipments applying that minimum rate to previous shipments you have made?

A. We have made approximately the same type of study

that the Navy Central Freight Control Office made cover-
[fol. 782] ing our shipments. We have a few examples. One in particular, from San Francisco to San Diego made on the 10th of November, 1955, it was listed on the shipping papers as System No. 19. It is confidential material. We were able to determine it was radar equipment, enough to classify it. We shipped it under rate tender at a cost of approximately $400. If it had been shipped under existing commercial rates, minimum rate tariff 2, the cost would have been approximately $1250.

Q. Was this an urgent shipment?

A. All electronics material are considered urgent, mainly because of the value. We try to keep our inventory very low. Also, the technological changes in the equipment require a lot of changes.

Q. Would you give another example, please, sir?

A. One example, San Francisco to Camp Pendleton, consisting of 674 boxes of miscellaneous material. These items consisted partly of hand trucks, wooden chests, sheet steel, wire, film, rheostats, brushes, condensers, optical lenses, varnish, electrical instruments, many other items.

The shipment was made under a voluntary rate tender at a cost of $180. Had it been classified under mixed rule minimum rate tariff 2, the cost would have been approximately $300.

I might point out that some of these items are packed in kits which are used in the field, for repairing radar or
[fol. 783] other technical equipment. Some of these kits contain double first class material. We could segregate, make it lower class in part, but it would defeat our purpose in logistic supply and the work of the men in the field. Many of these kits are shipped in mixed shipments.

Q. Could you give an illustration of a movement made in support of a combat training mission?

A. We have many of these combat training missions which come to us on short notice. Colonel Eastham stated the Marine Corps has to be in constant combat readiness.

This one particular instance I have in front of me, we have been shipping to 29 Palms, our desert training, rather spasmodically. We had shipped up to this time 12 carloads. We had let it go at class rates. We received a call that

approximately 75 carloads, tanks, heavy guns, would be shipped to the desert with the troops for training purposes.

We immediately compiled statistics comparing it with comparable commercial items, load density, and so forth, forwarded this information to headquarters requesting a rate study be made there to negotiate a rate if they thought feasible. This move had already started moving.

The next day we were advised the rate had been put in which resulted on this particular movement of a saving of approximately $20,000.

Incidentally, I might mention that when we had a hearing [fol. 784] on the 8th of February, when I returned to the office there was a call waiting to know what rate would be applied on this material returning. When they were advised that the restraining order had been upheld, we could still use the rate; that amounted to $10,000 savings, approximately.

Q. You have heard the previous testimony in this case, have you not?

A. Yes, sir.

Q. And do you agree that if the regulation by the California Commission should go into effect that would hamper you in the performance of your duties and would increase the rates to the Government?

A. It is difficult to say——

Mr. Phelps: Just a moment. The same objection.

Judge Lemmon: It is obviously leading, if you are objecting on that ground.

Mr. Phelps: No, it is on the ground it calls for a conclusion of the witness.

Judge Lemmon: Overruled.

Judge Carter: He may answer.

A. Thank you. This is a difficult question to answer. We would—well, for example, we shipped 18 million pounds, the Marine Corps, I should say, shipped 18 million pounds of mixed freight during the month of February this year. Even a 5 per cent increase, which is very low, in my opinion, [fol. 785] would amount to a considerable amount of money.

In addition to that, the manpower, man hours required in classifying, segregation and many other things, as have been explained by previous witnesses, would be involved.

[fol. 786] Q. Do you make many shipments of mixed intrastate and interstate traffic by call load and truckload?

A. Yes, sir; we do make a number of mixed shipments. As Colonel Eastham explained, we endeavor to observe the laws of the State and use carriers who have both interstate and intrastate rights if such a shipment is being made.

Q. Do you have many shipments which involve secret material?

A. Yes, sir. We are no different from the other armed services. We all have confidential material that even the shipping officer sometimes doesn't know what it is. We are able to ship it under our "freight all-kinds", or under armed guard in many cases.

Mr. Wigger: Pass the witness.

Judge Lemmon: Cross examine.

Mr. Phelps: May I take just a moment, Your Honor?

Judge Lemmon: Yes. We will take our afternoon recess.

(Recess.)

Judge Lemmon: Gentlemen, the members of this Court have been discussing a problem of their own and we thought we should notify you what the situation is that the three judges are in, so that counsel can fit their own arrangements into it.

We will have to recess this case if the testimony isn't completed tomorrow. We can't go on Friday, in other words.

If it goes over, it couldn't go over until next week because [fol. 787] the judges all have commitments otherwise.

I thought I might tell you that because you might have witnesses here in attendance who couldn't remain here.

Mr. McConnell: We have three more witnesses and they will be rather brief on the direct, and then one witness——

Judge Lemmon: Can you get rid of them this afternoon, possibly, and complete this case? We will go to 4:30 if necessary.

Mr. McConnell: We will proceed as fast as we can.

Mr. Phelps: It occurs to me, Your Honors, to inquire about argument now. I am hopeful we can finish the evidence by Friday.

Judge Lemmon: I think we will have to let that go until some date convenient to all parties concerned.

Mr. Phelps: To some later date?

Judge Lemmon: It couldn't go on next Monday, anyway.

Mr. McConnell: I might say that as far as oral argument is concerned, if agreeable to counsel, we will submit it. If counsel wants to brief the evidence, if the Court will give us a later time, or something of that sort to reply to any brief on the evidence. I can hardly see how oral argument will add to it.

Judge Hamlin: Well, don't you think you will all know more about it when the case is over?

Mr. Phelps: Yes.

[fol. 788] Judge Carter: If I may interject, in the other case Mr. Wigger is involved in, Mr. Wigger, you are aware that we have an argument in the other three-judge court case set for Friday?

Mr. Wigger: Yes, sir.

Judge Carter: As of tomorrow, I am going to vacate that date because this case is going to run into that and we won't have time to hear that argument, and because I happen to be on both of the courts we will have to reset that matter and I will have to take that matter up with the other members of the court and with counsel.

Mr. Wigger: Yes, sir.

Judge Lemmon: Proceed.

CROSS

By Mr. Phelps:

Q. Mr. Stallings, you have given us several examples of what you consider to be the effects of minimum rate tariff No. 2. You have given us an example of a San Francisco to San Diego shipment, one of the San Francisco to Pendleton shipments, and one of a shipment of a division to Twenty-Nine Palms.

Now, I will ask you how many other bills of lading or shipping documents you have examined for the purpose of conveying to this court a description of the kind of traffic that the Marine Corps has.

A. We have made a study of what we consider representa-

tive bills of lading on file in our office. I would say it would [fol. 789] encompass between 25 and 40.

Q. You have examined between 25 and 40 other bills of lading?

A. Yes, sir.

Q. But it isn't your contention, is it, Mr. Stallings, that the ones you have given us are representative, is it?

A. Yes, sir, they are representative.

Q. Would you identify for us, if you can, the special rate quotation from which this $400 charge was calculated by your first examination, San Francisco to San Diego?

A. Yes. That is a Section 530 rail quotation, No. 154E.

Q. How about the 674 boxes of miscellaneous items?

A. That is a special rate tender under Section 530, Allstate Transportation Co. tender No. 10.

Q. And was the third one a rail movement?

A. The third one was a rail movement, yes, sir.

Q. Can you tell us the percentages of your traffic hauled by rail v. that hauled by truck?

A. Our study, which covered in this instance, approximately nine months showed 42 per cent by truck, remainder by rail.

Q. When you say that these shipments that you have described, Mr. Stallings, were typical, is it your opinion—you did say, I believe, that you thought these were typical or representative of your entire traffic?

A. Yes, sir.

[fol. 790] Q. Don't you ship a great many other kinds of commodities than radar?

A. Yes, sir. The one example that I illustrated, the first one was radar, the other one was mixed shipments. I just picked two of them in particular to show the predominance of our traffic is highly concentrated or mixed consolidations. There are a few items that are too large to consolidate. This radar equipment was mobile radar vans. You couldn't mix them very well.

Q. Don't you ship a great deal of stuff that is commercial type items?

A. Occasionally we do. Sometimes subsistence food supplies. We ship those at either the commodity rate, if there happened to be one, or special rate tender, whichever happens to be the lowest.

Q. You didn't feel it necessary to show a bill of lading respecting that kind of goods?

A. No, because in most instances the commodity rate is very close if not the same as the rate tender.

Q. Yes. It didn't suit your purpose to show one where the rate was approximately the same, did it, Mr. Stallings?

A. We have examples where it's approximately the same. I don't happen to have them with me, but in our study we made quite a number of them. We were trying to show you representative shipments that would be affected by the [fol. 791] minimum rate.

Mr. Phelps: No further questions.

Judge Lemmon: Any redirect?

Mr. Wigger: No redirect.

Judge Lemmon: That will be all.

(Witness excused.)

Mr. McConnell: Mr. Broz.

James J. Broz called as a witness on behalf of the plaintiff; sworn.

By The Clerk:

Q. Please state your name and occupation for the record.

A. My name is James J. Broz, spelled B-r-o-z. I am deputy chief of the Air Force District Traffic Office at Mira Loma, California.

Direct examination.

By Mr. McConnell:

Q. What is your present position, Mr. Broz?

A. I am the deputy chief to Colonel Chambers, the Air Force District Traffic Office.

Q. State briefly your background and experience in transportation.

A. I have been in transportation and traffic management work continuously since 1923, or approximately 33 years, of which ten years or more were spent in the freight traffic

department of the Southern Pacific Railroad; three years [fol. 792] with the Valley Motor Lines in Fresno; three years with the Public Utilities Commission in San Francisco as an assistant rate expert and examiner; four years as an industrial traffic manager, Basic Magnesium in Las Vegas, Nevada during the war; six years as commerce counsel in Los Angeles; and four years in military traffic management.

Q. From that background and experience would you agree that military traffic is entirely different from commercial traffic?

A. It is.

Q. Have you made recent studies of Air Force traffic, systematic studies?

A. Yes. We made statistical and systematic studies of this traffic in California and how this proposed new legislation would affect that traffic.

Q. Are you familiar with the various items which the Air Force uses and ships?

A. Yes, I am familiar with them in California and elsewhere.

Q. Would you briefly describe the principal items that are involved in this traffic?

A. There are approximately 780,000 items in the Air Force stock list catalogue. Of that 780,000 items we practically stock all of those at Sacramento or San Bernardino or Maywood for use in California and shipping out to depots [fol. 793] worldwide.

Q. Will you briefly describe how these various items move into California and in and about in California?

A. Taking perhaps one of the most important items we have in the Air Force, the jet engine, the J-47 engine is used in the B-47 bombers, the B-36 bomber, and the F-86 fighter. It is a common type jet airplane engine. It is manufactured by the General Electric Company in Cincinnati, Ohio, where it is moved to two places, Oklahoma City for storage and San Bernardino for storage.

When it arrives at San Bernardino it is supplied either to the aircraft manufacturer in Southern California or to the existing air bases in California for what is called base maintenance of jet aircraft. It is also supplied to Sacramento for use in Sacramento's base maintenance of the F-86

aircraft. It is supplied to Castle Air Force Base near Fresno.

Judge Carter: Merced, isn't it?

A. Pardon me; Merced, California. And it has an evolutionary transportation program which may carry it either in the Air Corps or as a freight shipment within California or out of the State, and depending upon its flying time hours it comes back to California for overhaul and repair.

San Bernardino is the central repair depot for the J-47 engine.

[fol. 794] After approximately 1000 to 1200 flying hours that aircraft engine comes back to San Bernardino at Norton Air Base, where it is overhauled, and it then goes out again on the same cycle.

It may this time go to March Air Force Base which operates B-47 medium bombers, the type that is flying for great distances with refueling in flight.

It may go to George Air Force Base which has the F-86 fighters, that being a tactical command Air Force base.

It may go to Sacramento, which modifies the F-86 aircraft on a program where the engine is either placed in the aircraft there or is overhauled there, and that being a North American Aviation Saber Jet, North American at Inglewood is supplied that aircraft engine, and North American has a place at Fresno, California which also handles the repair of aircraft using this same engine.

[fol. 795] We might ship that engine to Travis Air Force Base over here near Fairfield, where it is placed on a MATS, or Material Air Transport System aircraft, to fly that engine to Japan and support similar type aircraft in Japan or Clark Field in the Philippine Islands or Hickam Field in Hawaii.

We may ship it to a water port, at San Francisco, if there is no great emergency on this immediate engine requisition and it happens to be a routine supply request; it will go by water with MSTS, Military Sea Transport Service, to those same foreign destinations. But that is just one item in the supply system.

Q. From your experience in the air force, what single element do you regard as the most important one in your work as traffic manager for the air force?

A. The greatest single element is transit time, the time when a shipment must be delivered to a destination to meet an objective, either in immediate supply replacement or to tighten the pipeline. We are faced with increasing costs of our high value spare part items, and this aircraft engines are valued at from $45,000 to $75,000 apiece. Obviously only a limited number can be carried in our inventory in the air force. We strive, therefore, to make time the element of economy in serving the movement of these engines from and to the places where they are needed and to reduce the amount maintained in regular stock levels.

[fol. 796] Q. Under your present procedures, with this restraining order still followed, while this present statute is restrained, how do you handle volume shipments?

A. A volume shipment, which is either ten carloads or ten truckloads, is analyzed to determine if a rate negotiation is necessary, and if it is, a teletype wire is sent to our headquarters at Dayton, Ohio, to review the movement and particularly to institute negotiations with carriers for a commodity rate.

I might say that most of the rates that we have in California today are either quotation rates or the Commission's PUC 2 class rates. If the negotiations are handled expeditiously by Dayton, it is possible sometimes to get an answer back within 48 hours, and a movement is thereby affected.

I know of one particular movement from Marysville, California, to San Bernardino, California, which was unusual and came up on the spur of the moment by the Continental Air Defense Command transporting some 70 carloads of ground handling equipment, machinery, and a special type of motor vehicles to serve a special purpose. There was no commodity rate on such movement. There was no quotation on such a movement, and the items were rather highly diversified and very heavy in their weight. A rail transportation was indicated in that case. We were [fol. 797] advised of the pendency of this movement on August 20th, 1955.

By direct negotiations immediately undertaken by Dayton with the California railroad and consummated in about five days, it was possible to get a quotation pub-

lished on September 3rd. The movement in the meantime had started on August 20th and was completed by around September 15th, 1955.

Although the quotation was made effective on September 3rd, it was made retroactive in application to August 20th, and on that movement we saved approximately $4700 on the 70 carloads.

Q. How do you handle sporadic shipments?

A. Sporadic shipments are handled either by tariff or by quotation because we do not attempt to negotiate on those. Rather than delay the shipment we pay the class rate if there are no quotations on that movement, but we prefer to have a quotation to cover future possibilities of such future shipments on that same item.

Q. Isn't it a fact that probably more than any of the other services the air force in intrastate shipments in California ships now on the class rate?

A. Yes. We do that because it is a matter of either sacrificing time or money, and we would prefer to sacrifice money at this particular time because the items we ship are usually of a high value and are in what is called a high supply priority category, category 1 or 2, which [fol. 798] requires a processing within 24 hours from the time the requisition is received. That 24 hours is divided between four agencies in the average depot. It comes in by telephone or by teletype and it is sent to the materiel control office, which vouchers the item and produces what is called an invoice for shipment, and that takes about two hours.

It then goes to the warehouse for selection of the item from stockage, and that takes about two and three-quarter hours. It then goes to packaging in its bare state, where it is packaged for shipment, which takes about three and one-quarter hours, and that leaves only 16 hours for transportation to process that shipment out, physically receive it into the transportation area, arrange for the carrier to call and pick it up, prepare the bill of lading, tender it to the carrier, and get it out of the depot, and we often find that 16 hours is all too short even at the present time.

Q. Does the air force as a matter of practice, due to the areas of its shipment, ship frequently in less than carload or less than truckload lots?

A. Yes. This might give you an idea. Take a typical month, November 1955. We issued some six thousand government bills of lading in California, of which approximately only 450 were truckload or carload shipments, the rest being so-called less-than-carload or less-than-truckload—that is, a total of 10,000—6,000 total and 450 carload or truckload.

[fol. 799] Q. So this method of operation, to meet this time limit, in itself makes the air force transportation problem rather expensive, does it not?

A. It does, because we have a greater number of LTL and LCL shipments than we would like to have.

Q. How do you handle routine, recurring shipments in regular channels?

A. Where there is an indication of a definite pattern of shipment between two specific points in California, and we are able to pre-plan for it, we will issue on carload and truckload shipments a standing route order good for 90 days, which permits the shipping activity to route that shipment via the mode of transportation and the carriers named in that mode that we specify in our route order.

However, the number of those standing route orders are a fractional number of the total amount of routing that we do, because there is no large amount of fixed pattern movement. I would say that on a shipment basis, about 40 per cent of the shipments, and possibly about 20 per cent of the tonnage would be on a fixed pattern basis. The rest would be on a non-recurring and irregular basis.

Q. Have you studied the relationship between the air force's rate levels under this rapid system and the normal commodity rate level in California?

A. Yes, we have compared the quotation rates with the [fol. 800] commercial level of rates, and we have found that the quotation basis of rates is higher than the commercial level of rates by a substantial amount.

Take the month of June 1955, I made a personal study of 398 truckload shipments of air force traffic moving wholly in California, which exceeded something like nine million pounds, and applying the quotation rates to that movement I found that the charges we actually paid were $32,931, but if we had been required to pay the PUC No. 2

rates, the Commission's rates, it would have amounted to $45,493, or an increase of 27.6 per cent.

Q. I do not know that that question was responsive, but we might get it in. You say in the first place the air force rate level, as it is now, without the statute going into effect, is somewhat higher than the commercial level, in your opinion?

A. Yes, it is.

Q. If they put in the requirements that did away with tenders or the minimum class rate in California, would that increase your rates even more?

A. Yes, it would. It would increase them substantially.

Q. Will you refer again to your study?

A. We have made some studies in that same month of June and selected these items out of the 390 truckloads to see what the specific effect would be on any large moving items. On airplane engines the increase would be 23 per [fol. 801] cent. On Freight all-kinds, it would be 43 per cent. On wrapping paper, which we move in substantial quantities, 53 per cent. But the sum average, as I stated, was 27.6 per cent.

Q. What effect would the state regulations of rates have on the work load in your office and the time consumed in your office to carry out your duties?

A. Well, it would substantially increase the amount of classification work that would have to be done not only in our office but in these three major depots I spoke of: Sacramento, San Bernardino and Maywood. I have stated the approximate manpower devoted to that work today, but there are about 22 people working in these three depots whose work is particularly confined to freight classification work. That includes our own office. If we had to classify the shipments that are in the mixed freight and freight all-kinds category, it would conceivably double the amount of work that would have to be done as well as increasing the charges on those shipments.

Q. Are you familiar with PUC procedures in processing rate applications?

A. My recollection goes back a number of years to the time I was associated with the Commission, and I believe they are still substantially the same today as they were at that time.

Q. Do you believe that the air force could accomplish [fol. 802] its mission and have its rate adjustments worked out through that procedure?

A. I do not, and the reason I say that is because the present method of negotiating directly with carriers is a matter on which I have had some experience, and having had experience with the Commission and before the Commission in California, I do not believe the processing time of administrative procedure is at all comparable. The present system is by far the most expeditious.

Q. Do you find any faults in the present system of arranging rates for government shipments?

A. No, the present system is one that has been devised as the best obtainable at the present time, and we are quite satisfied with it.

Q. Mr. Broz, do you use freight all-kinds rates in the air force frequently?

A. Yes, we have a large number of those shipments and they are brought about by the mixture of the various items that must be mixed in one shipment to one destination.

Q. Would the application of minimum rates schedules and Commission regulations hurt you particularly in connection with that particular type of shipment?

A. Well, it would hurt probably in two ways, both as to an increased cost, and, secondly, in the processing time. Maywood Depot is one of the depots that ship mixed [fol. 803] truckload shipments, and just to determine what its effect would be on us from the standpoint of increased freight charges and increased processing time, I selected three freight bills—pardon me—bills of lading at random on shipments made in February of this year, and on one shipment, to McClelland Air Force Base in Sacramento from Maywood, we actually paid $120 for the load. The Commission's PUC No. 2 would have brought that to $235.83, an increase of well over or almost 100 per cent.

On another shipment from Maywood to McClelland the charges as paid were again $120 a load, and on that, if we had paid the class rates on the items as shipped, and as they would have to be classified, we would have paid $251.73. That would be an increase in excess of 100 per cent.

And the third and last one was also from Maywood to

McClelland. We paid again $120, and on that shipment we would have paid $218.20, an increase of $98, not quite 100 per cent.

Q. Do you feel that those are fairly typical of instances of that sort?

A. Yes, we just selected them at random.

[fol. 804] Q. Mr. Broz, about what is the present Air Force freight bill in California? Do you have any figures on that?

A. We commit the Air Force to the payment of freight charges in California on California intrastate traffic to the extent of approximately $700,000 a month or about $8,000,000 a year.

Q. That is for shipments in California?

A. Strictly in California intrastate.

Q. Intrastate.

A. I would say that represents about 4800 truckloads of approximately 108 million pounds plus an additional rail movement, but we don't use rail as much in intrastate as we do truck.

Q. Why is it you do not use rail as much?

A. Well, on truckload shipments we find the truck service more speedy and flexible and generally we can get the shipment over long distances overnight.

Q. Is the overnight shipment an important element in Air Force logistics?

A. Yes, it seems that supply requisitions come in the morning, are packed and processed during the day and move through the carriers' terminals overnight, and they usually want them at the destination the following morning when they are ready for business.

Q. Are you secured for security purposes, Mr. Broz?

[fol. 805] A. Yes, I have been cleared for top secret.

Q. Are you familiar with security traffic in the Air Force, between the Air Force installations in California?

A. I am.

Q. Could you describe some of the standard types of that traffic without revealing any——

A. Well, as Colonel Chambers pointed out, we have a number of aircraft and warning sites in California, located at various strategic locations, usually in mountainous areas

and in very hard to get places, and there are about 18 of those, generally, to which shipments are made of a usually classified nature.

Then we have the movements of such items as electronics and radar components which come back to us from overseas and from the local Air Force bases for repair and overhaul. They are called the black box shipments, for want of a better term, and they go to various firms like Lear Radio and Hughes Aircraft for reconditioning.

Then we have the guided missile program in California. Lockheed has one program, Hughes has another, Northrup has another, and in these guided missile programs the component elements are classified as to their movement and their movement from the assembly point to stockage areas and to Air Force bases for use in maneuvers and practice are also classified.

[fol. 806] Q. Do some of these movements of guided missiles fall fairly well in channels of trade?

A. Yes, the guided missile program is a fairly well defined pattern, the AC&W movement the same way, and also the black box shipments, and the fact that they are in such a well defined pattern is one that causes us to become very concerned about disclosing anything about such movements.

Q. Would it be possible to reveal the information necessary to make, to have a rate approved on such movements to the Public Utilities Commission?

A. No, for two reasons. I think the commodity involved and the origin and destination are such that those are the three items of information which the military would prefer to have not disclosed.

Q. Would it disclose it under any circumstances?

A. It could not under existing regulations; Air Force Regulation 205 prohibits that.

Q. What then would the Air Force do if this regulation came into effect with respect to shipments of that sort, if it came into effect tomorrow?

A. We would very likely have to apply to higher headquarters for authority to operate under an exception to the security regulation, and just what exceptions would be granted would be hard for me to say. Up to now there has been no deviation from those regulations.

[fol. 807] Q. Would you ship them at class rates?

A. Yes, the class rates applicable on these items could be used, and if we used an analogy to the actual item, indicating that the electronics item is an electrical appliance, for example, we could pay the class rates. But there again, we would be hit very hard because most of these items today move under commodity quotations which are around the first class rate, whereas the actual class rating is second or double first, three times first and four times first class.

Q. How much would it increase your——

A. Well, the charges there as indicated by the percentage relationship would increase it four to five hundred per cent.

Q. In addition to that, you would have some difficulty fitting them into the rule of analogy, isn't that right?

A. That is true.

Mr. McConnell: Thank you.

Cross examination.

By Mr. Phelps:

Q. Mr. Broz, as I understand you—I had a little difficulty following you. Perhaps my notes are defective—but as I understood your testimony, you stated in substance that you now ship on a class rate for many items.

A. In the l.c.l., l.t.l. categories.

Q. Yes. Are those class rates for the items you had in mind in expressing that testimony class rates derived from commercial tariffs?

[fol. 808] A. Class rates taken from the Pacific South Coast Air Bureau 255, or the Motor Carriers' Class Rate Tariff, or PUC No. 2.

Q. I see. And it is true, is it not, Mr. Broz, that your office maintains a library of tariff publications?

A. Yes, we have a tariff file.

Q. Can you tell us approximately how many tariffs you have in your office?

A. Well, we have approximately 2500 rail and motor and water and express tariffs, and about 600 quotations, but that covers the 12 western states.

Q. Yes. Do you have a librarian in charge of that tariff library?

A. We have a tariff clerk.

Q. I think you said you were quite satisfied with the present system of procuring transportation; is that right?

A. That's right.

Q. Are you familiar with some of the criticisms that have been directed at the present system?

A. I am.

Q. Are you familiar with the views of the Interstate Commerce Commission?

A. I am.

Q. Of the Hoover Committee?

A. I am.

[fol. 809] Q. Of the so-called Weeks Committee?

A. I am.

Q. And you are aware of the fact that in those reports the present system of procuring transportation for government traffic has been very severely criticized, has it not?

A. I realize that it has, and I do not agree with those views.

Q. Is it not true that the Interstate Commerce Commission has recently conducted an investigation into the question of present procurement practices under Section 22 and that there is now outstanding a proposed report by the examiner who presided at that proceeding?

A. I read that report.

Q. I think you do not subscribe to the views expressed by those reports that I referred to?

A. No, I do not, and I have good reasons for it.

Q. Do I understand that you think that there are no abuses whatever connected with the present system?

A. Oh, there are abuses connected with the present system. There is always a margin of very vigorous competition that creates difficulties, but I don't believe that the marginal ten per cent should be allowed to change the rule that is working effectively for the 90 per cent.

Q. I take it that one of the abuses you are adverting to now is that which results from the fact that the intense [fol. 810] competition for government traffic has resulted in the depressing of rates, is that right?

A. In some circumstances, yes.

Q. And I take it that you would concede that is an abuse, would you not?

A. Yes, I think any unwarranted competition is always harmful to anyone.

Q. And is not that an abuse which in your opinion needs to be corrected?

A. I believe it can be corrected from within. I believe the military in the conduct of their traffic management affairs can very well keep that matter in control.

Q. Now, you gave us some examples of shipments that you had picked at random for the month of February 1956. The first one was an item, I believe the point of origin was Maywood, perhaps that was the destination, but in any event, it was one that involved $120 under a special quotation and $235.83 under the PUC tariff. Now, would you tell us what was the commodity there?

A. The commodities there were a mixed lot, including clothing, shoes, maps and charts, printed matter, and IBM cards, paper forms, rubber goods, aluminum articles, molded outlet plates, rubber gaskets, filters, transmitting tubes, rectifiers, capacitors, electric switches, resistors, electric wiring plugs, paper tags, electric lamps, incan- [fol. 811] descent, electrical appliances, airplane parts, aluminum articles, machinery parts, fuel oil cells, and aluminuin tubing.

Q. How many items all together?

A. I didn't count the items, Mr. Phelps, but there were 419 pieces in the shipment.

Q. Who was the carrier?

A. The carrier there was Allstate Transportation Co.

Q. Allstate. You frequently use Allstate?

A. Yes, Allstate has a quotation on file with us and we use them to the extent that they serve the Air Force's interest.

Q. Now, how about your next one, Maywood to McClellan-, again for $120; the PUC charge, $251.73.

A. That was one consisting of clothing, webbing——

Q. You needn't read them all. Was it a mixed lot?

A. It was a mixed lot, yes, sir.

Q. How many items?

A. I didn't count the number of items. There were 451 pieces and six continuation sheets.

Q. That was an f.a.k. shipment?

A. Yes, it was.

Q. Who is the carrier?

A. Allstate Transportation.

Q. Allstate again?

A. Yes.

Q. Do you use any other carrier?

[fol. 812] A. Oh, we use quite a few.

Q. I see. How about the third example, $120 at the present rate, and $218.20 for the PUC rate?

A. I didn't count the number of items, but there were 715 pieces in this particular shipment, and there again, we used Allstate Transportation Co.

Q. I see. But you selected these at random?

A. Well, I asked my people to get me some bills of lading on freight all-kinds rates where there were mixed truckload shipments involved. And Maywood happens to be one of the depots close to us from which we could select them, and they were shipments typical of a depot; whether they move by Allstate or any other carrier wouldn't seem to me to make much difference. I could get $120 from other carriers, but we just selected Allstate.

Q. How many other motor carriers do you use for intrastate traffic?

A. Throughout the whole State of California I judge we use between 60 and 80 carriers.

Q. And yet a random selection of three shipments in February produced the same carrier in all three cases.

A. Yes, sir.

Q. I see. You told us that your bill for transportation was $700,000 per month for California intrastate traffic. How much of that represents l.c.l. traffic?

[fol. 813] A. I would think that between 15 and 20 per cent of that is on l.c.l. traffic. Pardon me. We figure 80 per cent of our tonnage is on carload and truckload and 20 per cent is on l.c.l., l.t.l. So on a charge basis, and since all charges are on a hundredweight basis, I would say about 20 per cent.

Q. Now, I had great difficulty following you, Mr. Broz, with some figures you gave over here when you were giving us the effect of the application of minimum rate tariff rates. You finally ended up with 27.6 per cent increase.

That was an average of some percentages which you arrived at on engines, I believe, is that right?

A. It included 398 truckloads of which 136 truckloads were engines.

[fol. 814] Q. And f.a.k. of 43 per cent, paper rates of 53. Rates on paper—wrapping paper.

Have you got a breakdown of those percentages, how you arrived at them?

A. Well, as I said, I made this study in June of 1955, and I just selected these items from that statement. I selected the heavy moving items because I thought they would be more representative of the places we would be harder hit. I do have the figures here if you would care to see them.

Q. Well, let's see if I can shorten this here. I am completely lost in trying to get these figures down.

You compared some special rates and commercial rates, is that right?

A. I compared the rates we paid under the quotations with the PUC No. 2 minimum class rates.

Q. And I think you said the special was higher, didn't you? Did I make a mistake in noting down that you said the special rate seemed to be higher?

A. No, the special quotation rates proved to be lower.

Q. Oh, I must have misunderstood you.

Judge Carter: But you did say, however, they were higher than certain commodity rates.

A. Higher than certain commodity rates paid by commercial industry in California for approximately the same hauls in the same areas. Thank you, Your Honor.

[fol. 815] By Mr. Phelps:

Q. Now, one more thing, Mr. Broz: You spoke of the secret shipments. You indicated that you formerly were employed by the California State Commission. Have you any reason to think that the California Commission would not be reasonable in its disposition of any requests from the carriers or from the United States Government for the transportation of secret material?

A. I have the highest regard for the Public Utilities Commission. I have no reason to expect that they would not treat that information with the strictest confidence.

Q. If the Commission should see fit to make a blanket exemption of commodities classified as secret, that would meet entirely your objection, would it not?

A. I don't know that it would. I would have to examine the possibility of how we would operate under such a blanket exemption.

There might still be an element of time administratively that might require us to go to the Commission which we do not have in our procedure.

Mr. Phelps: No further questions.

Judge Lemmon: Anything further?

Mr. McConnell: Nothing further.

The Court: Thank you.

(Witness excused.)

Mr. McConnell: May it please the Court, we have just [fol. 816] two other witnesses. They are from Washington.

On this national level thing, our testimony has been rather thought out to follow a certain line. We think the information is important for the purposes of the Court.

If we could recess, I believe we could have it organized so that we could cover both of them in at least thirty minutes, an hour tomorrow, if that would be possible.

Judge Lemmon: The Judges have considered the advisability of resuming at 9:30 tomorrow morning. Has counsel any objection to that?

Mr. Phelps: I have none, Your Honor.

Judge Lemmon: Then the adjournment will be until 9:30 tomorrow morning.

(Whereupon this cause was adjourned to tomorrow, Thursday, March 22, 1956, at 9:30 o'clock a.m.)

[fol. 817] Thursday Morning Session, March 22, 1956, 9:30 A.M.

The Clerk: United States of America v. Public Utilities Commission of California; on trial.

LEONARD HILL called as a witness on behalf of the plaintiff; sworn.

By The Clerk:

Q. Please state your name and occupation for the record.

A. My name is Leonard Hill. I am the representative of the western railroads, residing in Washington, D.C., for the purpose of handling and expediting the handling of freight rate matters for the United States government.

Direct examination.

By Mr. McConnell:

Q. Mr. Hill, how long have you been concerned with transportation matters, particularly rate matters?

A. I have been employed in various capacities by the western railroads for the past 39 years, and most of those years were spent in handling the matter of freight rates for commercial shippers and for the government.

Q. Will you briefly explain the duties of your present office?

A. In my present capacity I keep in contact with the various agencies of the federal government on the matter of freight rates. I receive proposals from these agencies [fol. 818] for changes in rates rules, and after they have been authorized by the carriers I represent, I tender the changes to the United States government.

Q. What situations usually give rise to the exercise of your rate-making responsibilities?

A. Usually they are cases where an agency of the government finds it is necessary to move a large volume of traffic and is confronted with the payment of class rates in that volume. Class rates have already been described

here. Therefore, there is a necessity in those cases for arranging a rate which will fit the needs of the traffic.

Q. What is the usual criterion that you use in arriving at the rate which you say would fit the traffic?

A. We usually try to consider the matter in the same light as if a commercial shipper were involved. By that I mean we have to consider the situation as if a commercial shipper had a shipment of this nature and apply the same criterion. We try to treat the government just the same as we would a commercial shipper if a commercial shipper had a movement of that kind.

Q. Mr. Hill, could you briefly describe to the Court the actual machinery that you use and technique?

A. When a request comes to me for a change in rate or for the establishment of the rate, I discuss it very briefly and get all the information I can, and I then get [fol. 819] in touch with the railroads I represent, explain the situation, furnish the information, get the approval of the rate, and in turn tender it to the United States government. This is done usually by telephone.

Q. How long does it take you to arrive at a rate of this sort under your present procedures?

A. We have the means of arriving at a rate of this sort and tendering it to the government in a matter of a few hours if that may be necessary.

Q. Are you pretty busy at all times?

A. Yes, I am busy at all times.

Q. Just calling on your recollection, do you recall any illustrative movements that have been made recently?

A. Yes, I recall that witness Stallings mentioned one I was involved in. That was a very quick movement of tanks from Camp Pendleton to Twenty-Nine Palms, and just going on my memory, just before I started for this meeting which was in the last thirty days, of course, I was informed by the Army of a movement of mounted guns from the area ordnance depot at Lacarne, Ohio, to Fort Ord, California, and I was advised that the guns were to start moving the day the request was made on me for the rate. I got in touch with the carriers who are involved in a movement of that kind. There are a great number of [fol. 820] them, as you might well understand. There are

many routes between the origin and the destination, and so it is necessary to get in touch with all the carriers that may be involved and move very quickly to get the answer.

It took several days to wind this up and get the rate established, but it was made effective when it was tendered as of the day the request was made on me. I might add that the reason for the request in that case was that there was nothing but a class rate to apply on that movement, and just drawing on my memory again, I remember that it was somewhere near $8.00 per hundred pounds. The rate that we finally arrived at for the government was in the vicinity of $4.50 per hundred pounds. So the government saved in that case approximately $3.00 a hundred pounds.

Q. Was that a large movement as far as pounds were concerned?

A. Yes, that was a substantial movement. I don't remember the exact volume, but it was substantial.

Q. Mr. Hill, you have heard testimony given here in this proceeding, have you not?

A. I have.

Q. In your opinion, would the regulation of rates for the shipment of government property by State Commission seriously interfere with the government in the discharge of its responsibilities of supplying the armed services and [fol. 821] their constitutional duties?

A. Yes, I am of the opinion that it would for all the reasons which have been given by the witnesses here, and with which I am familiar myself.

Q. Mr. Hill, do you have security clearance?

A. Yes, I have top security clearance.

Q. There are representatives of other railroads in Washington?

A. Yes, there are. The railroads of the United States are represented in Washington by three men. I represent those, generally speaking, west of the west shore of Lake Michigan and the Mississippi River. There is another man who represents those east of the Mississippi River, south of Ohio; another man represents those east of the Mississippi River and north of Ohio, generally speaking.

Q. Do you know if those men have security clearance also?

A. They have the same security clearance I have.

Q. Do the matters that come up to you for rate adjustment arise both in intrastate and interstate traffic?

A. Yes, they do.

Q. Mr. Hill, could you briefly describe how you handle a movement that has an element of security or security?

A. When I am advised of a movement of that kind, I discuss the matter with the agency that may be involved and develop all of the information that I need for the [fol. 822] purpose of arriving at a correct freight rate. I satisfy myself that the rate which is arrived at will accord the railroads I represent proper revenue, and then advise the railroads of that movement. Until then I can not divulge the name of the commodity, but I can assure them from the information that I have that their revenue is protected.

Judge Hamlin: That what, Mr. Hill?

A. That their revenue is protected.

By Mr. McConnell:

Q. How many people besides you might know the nature of the particular——

A. To the best of my knowledge, the only people who would know anything about that kind of work, about that kind of a move, would be the person or the persons with whom I deal in the government about that shipment.

Q. Mr. Hill, do you think from your point of observation at present the system of rate adjustment for the government is a good one?

A. Yes, I do. I think it is. And I would like to add this, if it please the Court: The railroads of the United States have had a great deal of experience in the handling of government freight, and it's a matter of record during World War II 97 per cent of the military traffic of the United States moved by rail.

The present system is based on experience with it, and it fits the needs of the traffic and the needs of the traffic [fol. 823] are directly involved with the national defense.

Mr. McConnell: I have no further questions.

Cross examination.

By Mr. Phelps:

Q. Mr. Hill, you have stated that in your opinion the present system of procuring transportation for government traffic is a good one; is that right?

A. That is right.

Q. In your opinion, are there any deficiencies in the present system?

A. Well, there could be some deficiencies, as there are deficiencies in most anything that is set up. I am not aware of any right at the moment. It worked pretty well.

Q. At the moment you are not aware of any deficiencies in the present system, is that your testimony?

A. I will put it this way: If the system is properly applied, there are no deficiencies in it.

Q. Well, is it properly applied uniformly?

A. To the extent that it is humanly possible to, it is properly applied. We have some failures due to human failures, but if the system is properly worked, it does the job.

Q. But like any system, it doesn't operate in the abstract, but it operates through the agency of human beings, does it not?

A. That is right.

[fol. 824] Q. And like anything, any system operated by human beings, it has the imperfections that flow from the defects in human nature, does it not?

A. Yes, anything has that.

Q. Now, one of the defects in human nature is the desire to get business, isn't it, if we can call that a defect, depending upon the point of view? But if that occurs in an extreme form, it can be a fault of unethical competition, can it not?

A. Well, I might make this statement and I believe it will answer that question. I am in the admirable position of not having to seek business. My job is purely a service job. It was placed in Washington for the sole purpose of aiding the United States government in the performance of its constitutional duties, and I am not charged with the securing of any business at all.

Q. I see. Well, I take it, then, that the system which

you referred to when you said that you thought the present system was a good one, was that limited system within which you personally operate; is that right?

A. The system that I referred to is the system that accords the United States government the rates that it has to have in order to perform its constitutional duty, and in that duty is the defense of the United States.

Q. Now, you haven't quite answered my question, Mr. Hill.

[fol. 825] A. I intended to. I am sorry if I didn't.

Q. The system that I want you to comment upon, having in mind you have testified that the present system is a good system——

A. Yes.

Q. I want to know whether or not in using the word "system" you are referring to merely that limited portion of it with which you are personally concerned, that is, the negotiating of rail rates on the national level, or whether you are talking about the system as it operates nationwide and in intrastate traffic, both for rails and for trucks. Which is it? The first or the latter?

A. I am expressing my opinion in regard to the system as it operates over the entire United States, both for rails and for the trucks.

Q. Very well. Now, having in mind that system in that comprehensive form, is it still your opinion that that system has no defects?

A. Mr. Phelps, if I made the statement that it had no defects, I would be saying something that probably wouldn't be so. I said before that any system you set up has defects. You can't get away from them.

Q. Well, now, will you tell us what they are, as you understand them, in the present system, using the word "system" as I have indicated.

[fol. 826] A. Well, I said a minute ago, if I remember correctly, that I couldn't think of any defects at this moment.

Q. You admit that there are some defects, but you don't know what they are?

A. I would say that there are bound to be some defects for the very reason which you gave, that we are working

with human beings and human beings make mistakes and once in a while it may go wrong, but that doesn't hurt the system. The system is very good.

Q. Do you keep yourself informed, Mr. Hill, upon the current thinking of transportation men upon the question of the present system of procurement?

A. I do my best. It is quite a job, I assure you, because it requires a good deal of reading and I am a busy man, but I do my best.

Q. I take it that you are aware of some of the criticism that has been directed at the present system?

A. Yes, I am.

Q. Are you familiar with the report of the Hoover Committee?

A. I am familiar with it in a general way. In fact, I had some conversations with members of the task force of the Hoover Committee that formed the basis for the Hoover Committee report.

Q. Are you aware of the fact that in the report made by [fol. 827] the Hoover Committee that reference is made to the maintenance of separate supply lines by the various agencies of the military establishment?

A. I am, as I said before, not familiar with all the details of the Hoover Committee report, and therefore I can't confirm what you say, but if you are reading it, I am willing to take your statement.

Q. Let me read to you one statement, if I may, from this report, and ask you whether or not you agree with it:

> "The maintenance of separate supply lines has a tremendous dollar cost to the taxpayer. It is contrary to principles of integration. It is contrary to principles of good business management as practiced in industry."

Do you agree with that?

A. Well, I might say this: My reference to the system refers to the matter of making freight rates for the federal government. Now, if you are talking about some system other than that, then I am not qualified to make any statement about it.

Q. You are not informed, then, of the present methods and organization of the government procurement agencies?

A. Yes, in a general way I am, to the extent that my duties bring me in contact with it.

Q. Well, then, do I understand your testimony now to be, [fol. 828] then, that you don't feel yourself sufficiently informed to tell us whether or not you have an opinion upon the view I have just quoted to you?

A. No, I don't feel that I am qualified to express an opinion about that. That is outside my sphere of activity.

Q. Let me read you another sentence:

> "There is an excessive number of employees performing traffic management functions."

I take it you don't know enough about the government system to have an opinion upon that, do you?

A. No, I do not.

Judge Carter: Mr. Phelps, what does traffic management by the government and the question of consolidation of government agencies in the transportation field have to do with this question as to whether or not a rate or a regulation by the State will impede the government operation?

Assuming that the government operation changed in accordance with the suggestion of the Hoover Report, what difference would that make in this question?

Mr. Phelps: I should like to answer that this way, if Your Honor please: I would suppose that one of the questions, one of a great many matters which this Court will want to think about in determining whether or not the local regulation imposed an unreasonable burden upon the present system of procuring government transportation, [fol. 829] would be whether or not the present system is a good one and whether or not it needs to be reformed.

The Court: Well, if it was reformed, wouldn't the basic problem be the same as a matter of law?

Mr. Phelps: Well, the plaintiff here asks of this court to nullify an attempt on the part of the State of California to correct some of the abuses which the State of California has found exist on the intrastate level.

Now, if Congress, after being importuned by the various persons to whom I have referred, the Weeks Committee, the Hoover Committee, the Interstate Commerce Commission,

if Congress should act and take appropriate steps to amend the federal law applicable to interstate commerce, after this court had, at the request of the plaintiff, nullified the state law, I submit that that would be a most unfortunate state of affairs.

My purpose here is to indicate to Your Honors that the present system of obtaining transportation for government traffic contains many defects, that it has been the object of severe criticism from numerous quarters, informed quarters, and that there is good reason to think that Congress may itself take the necessary steps to correct those abuses on the national level, and therefore I would like to argue that the State of California should be left free to take the same kind of steps on the local level.

[fol. 830] The Witness: If Your Honors please, I might add somethere here if I may, if it would help a little in our understanding of this situation.

Mr. Phelps: Just a moment, now. I should like to have it appear that I have not asked the witness a question. If the Court wishes to hear a voluntary statement of the witness, I have no objection.

Judge Lemmon: I would like to hear it.

The Witness: It is a voluntary statement, but is brought about by the discussion here of this question.

The Hoover Commission report which we have been discussing was brought about by some criticisms of the manner in which this traffic management function was being handled.

Now, I try my best to keep in touch with this situation and watch what occurs, and I can assure you from my standpoint up there in Washington that a great many of these things that the Hoover Commission complained about have now been corrected, and they are in the process of being corrected right at this moment.

And I thought that I would add that here because the Hoover Commission had a salutary effect and brought about some changes in the thing. And that's why I say, with these corrections that have been made——

Judge Lemmon: Give us an example of one of these corrections that have been made.

[fol. 831] The Witness: I do not want to be critical of

any individual or any agency, but there was criticism there from the standpoint that certain agencies were playing one form of transportation against the other for the purpose of beating down rates. That is just like anything else. That is not the result of the system. That is the result of the way some individuals work the system. Now, when you correct the way the individual is operating, then you get back and work your system, which is all right, and many of these criticisms were brought about by the actions of individuals and not by the working of the system.

By Mr. Phelps:

Q. Isn't it true, Mr. Hill, that those officers who are charged with the responsibility for obtaining transportation of government property are bound by certain directives which require them, make it their duty to obtain for the government the most advantageous, economically advantageous form of transportation available; isn't that true?

A. No, that is not my understanding. The rule is this, that a government representative charged with the duty of purchasing transportation must purchase it as economically as possible consistent with the service required, which is a little bit different from the way you stated it.

Q. Are you familiar with any expressions of opinion by the Controller General of the United States with reference [fol. 832] to the duty of procurement officers in obtaining government transportation?

A. In a general way, yes.

Q. Isn't it true, Mr. Hill, that the Controller General has on two occasions at least expressed the view that government procurement officers have no duty to attempt to implement that phase of the national transportation policy which is intended to insure the economic stability of carriers?

A. The Controller General has made a statement of that kind, and I would like to say in connection therewith that the national transportation policy is a part of the law of the United States, and in my humble opinion, the Controller General—I would not say that he is violating the law, but he is not making a statement that is in conformity with the spirit of the law of the United States, because

that law says in general terms that the national transportation policy should be conformed with, and as long as the Controller General is a citizen of the United States, just like I am, he should conform with the spirit of it just like I try to.

Q. I take it, then, your view is you are better able than the Controller General to express the intention of Congress as outlined in the national transportation policy, and that the Controller General is wrong when he says that government procurement officers have no duty to protect the [fol. 833] economic stability of the carriers?

A. I did not make a statement of that kind and that was not the spirit of my remarks. I am sorry, Mr. Phelps, I do not mean to be non-cooperative, but that is just the way it is from where I sit up here.

Q. I would like to read you one more statement from the Hoover Committee report:

> "One administrative practice of certain government shipper agencies appears to us to be injurious to the best interests of the carriers and perhaps of the government as well, namely, the practice of keeping tendered Section 22 rates secret until actual movement of shipments under the rates commences. This practice should be abandoned, since it precludes open and orderly competition for government traffic."

Do you agree with that?

A. That statement was correct at one time but that situation has now been corrected and there is no longer a situation like that in Washington. It was changed by that criticism right there. We have no difficulty in Washington finding out what the rate is by any form of transportation from one point to another on government traffic.

Q. Is it your view that any carrier, then, interested in government business can go to the appropriate agency and find out what the rate of his competitor is?

[fol. 834] A. I know from personal experience that they can, and I might add that at this particular moment there is a public file in the office of the Department of the Army in Washington where any person in the transportation

industry, whether he be a rail carrier or a motor carrier, can go and find the rate by his competitor. The Army makes those quotations public for everybody.

Q. The burden is upon the carrier to go about hunting in various offices to find the rate now, isn't it?

A. No, it is not. It is set up for you in the most convenient manner. It is put in bound volumes. It has an index, and if you have any difficulty finding out what it is, all you have to do is to ask the man you deal with in the Army and he will help you find it.

Q. Are you aware, Mr. Hill, of the proceeding that took place between the California Public Utilities Commission during the year 1955 involving a petition of a group of truck operators who were hauling government traffic?

A. I have become aware of it since my participation in this case. I heard you explain it here the other day.

Q. Are you aware of the fact that as recently as around the middle of 1955 the attempt which the California Commission made to correct some of the abuses which it had found to exist was frustrated by the refusal of the Department of Defense to require the carriers doing business [fol. 835] with them to publish their rates? Are you aware of that fact?

A. Will you state that again?

(Question read.)

A. I am not aware of that fact.

Q. Are you aware of the volume of business transported by the rails in California for the government?

A. Yes, I am aware of that from my participation in this case.

Q. Are you informed as to the comparison of tonnages which they are now hauling for the government as compared to what they were in previous years?

A. No, I do not have any information in that regard.

Q. Hasn't there been a steady decline in the tonnages hauled by the rails in California?

A. I can't say because I said I didn't have any information about it.

Q. Are you familiar with the rate structure of the rails for government traffic in California?

A. I can't say that I am familiar with it, no, because my duties are pretty widespread. I represent every railroad operating in the territory, as I said, west of the western shore of Lake Michigan and the Mississippi River, and I deal with a pretty broad subject, but on occasion you may have to get into local situation. We have many states in [fol. 836] our territory. Over half of the United States is embraced within that territory, so I am not familiar with the local California situation.

Q. You do not know whether or not the rails in California presently have on file with the government f.a.k. rate quotations between Los Angeles and San Francisco?

A. I have heard that statement made by witnesses here and therefore I am aware of it.

Q. You have heard what statement?

A. That there are f.a.k. rate quotations in effect in California.

Q. By the rails?

A. Yes, by the rails.

Q. Who was the witness who expressed that here?

A. As I understood it, it was not necessarily a tariff rate. There are rates probably in quotations, as I understood the witnesses. I understood somebody to say here the other day there was a freight all-kinds rate.

Q. On rails?

A. Yes, I understood it was on rails in a quotation.

Q. But you have no personal knowledge?

A. No personal knowledge. As I said before, I am not familiar with the local California situation. I probably should not say very much about it. I am only trying to answer your question and be cooperative on the thing.

[fol. 837] Mr. Phelps: No further questions.

Mr. McConnell: No further questions.

ANDREW PAUL FLANAGAN called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name and rank.

A. My name is Andrew Paul Flanagan. I am a lieutenant colonel, Transportation Corps, Regular Army.

Q. Colonel Flanagan, what are the duties of your present assignment?

A. I am charged with the responsibility for negotiating rates with commercial carriers, nationwide, for the movement of Department of Army freight.

Q. Where is your station?

A. My station is at Washington, D.C., in the seat of the government.

Q. Might it be said you are the corresponding member, as far as the Army is concerned, to Mr. Hill, as far as the western railroads are concerned?

A. I deal with Mr. Hill, with western carriers, for western carriers, similarly as Mr. Hill has stated. I deal with a representative from all the eastern carriers, for all the southern carriers, and with representatives of the truck lines.

Q. What are the primary responsibilities of your office?

A. My primary responsibility or the primary responsi- [fol. 838] bility of my office is to see that the government pays a just rate on the movement of its traffic, and that we do not pay an unjust or an unreasonable rate for the movement of our traffic, because so much of it is based on class rate structure which has been described to the court previously.

Q. How frequently do situations come up in which you are faced with this situation where you have to get a special rate or a negotiated rate?

A. We are negotiating rates constantly. As far as the urgency is concerned, we have a great many cases of that nature, because we go on this general theory, that the supplies must move, and we do not wish to delay those supplies because of rate negotiation purposes. We are able to obtain rates retroactively on our movements. We are able to obtain rates where necessary most expeditiously by means of telephone contacts. In a matter of hours it is possible for our shop to establish a rate for movement.

Q. Maybe you have stated it, but what is usually the occasion for the reference of a situation to you for rate adjustment?

A. A large volume movement will be generated in the field. We will become aware of that movement by a copy

of the shipping agency's—or by sometimes even hearsay and investigate into it. We look at the movement, we look at the rate structure. We determine at that time through [fol. 839] our technicians whether that rate structure is reasonable or not. If it is not reasonable, we consider it unjust, we then take action to establish what we consider to be a just and reasonable rate for the movement of that traffic.

Q. In most situations of that sort are you simply faced with the class rate structure?

A. Generally, in the majority of the cases that would be correct.

Q. There would be no commodity rate that would be comparable——

A. All our shop actually seeks, and all we are allowed to seek by Department of Defense policy, is a reasonable rate similar to what a commercial shipper would establish on his movements. We use the same criteria that an ethical commercial shipper would use in negotiating our rates with carriers.

Q. Can you give us some idea of just how quick you can act if the situation is very urgent?

A. As I stated before, it is a simple matter, for example with Mr. Hill, of picking up the telephone and asking Mr. Hill, giving the basis of the rates and asking Mr. Hill to establish that rate. With the truck carrier I could talk to his Washington representative by telephone or, if necessary, I can call long distance to a freight traffic manager or an official of a truck company that can bind his com[fol. 840] pany.

Q. About how many truck companies have representatives in Washington?

A. I can't say the exact number. There is a tremendous amount. I would say at least 60 truck companies or more are represented in the seat of the government.

Q. Are any of the California trucking companies represented in the seat of the government?

A. If we consider trucking companies that carry inter- and intrastate, in and out of the State, yes, there are such representatives there.

Q. Colonel Flanagan, could you give us several concrete illustrations of how your machinery has worked there recently?

A. I think I can give you a typical example that will tie these various things together. First, the use of the telephone, and our method of negotiating, and the expeditious means that we have at our disposal. We have a comparable movement of small arms and ammunition. It was from our Navajo Ordnance Depot at Belmont, Arizona. The destination was Holland Field in Utah, an Air Force installation. Within this same territory, but not covering our movement, was a published tariff commodity rate for the movement of small arms ammunition. We took that rate and examined it. We compared it to our movement, [fol. 841] and on the same basis we asked for a rate representing the same percentages of class rate and commodity rate for the movement of that material. It was requested by telephone. We were able to establish that rate prior to the actual movement of the supplies.

It might be interesting to observe that if we had paid the class rate structure on that movement versus the commodity rate that we did establish by rate tender, the additional cost to the government would have been $73,000 on that movement.

Q. Colonel Flanagan, you have heard the testimony that has been given in this proceeding, have you not?

A. Yes, I have.

Q. In your opinion, would the regulation of rates by State Commissions for the movement of government properties interfere and impede you in the discharge of your responsibilities?

A. Yes, sir, and if this situation should spread to other states, we would be faced, in my opinion, with an intolerable situation. We would be deprived of the flexibility and the expeditious methods we now have of establishing rates on army military traffic.

Q. Colonel Flanagan, are you cleared for security matters?

A. I carry a top secret security clearance.

Q. Do you handle a number of security shipments?

[fol. 842] A. Oh, yes. Naturally, in our particular type

of traffic, such things will arise many times and we frequently do.

Q. Will you please tell the Court how, as a practical matter, you handle shipments of this nature?

A. In the case of where the carrier has a representative with a carrier's security clearance, I will tell that individual, not everything about the shipment, but all that he needs to know. We must realize that this classification, if a man is cleared for top secret, you do not have to tell him everything. It is on a need-to-know basis. You tell him only what he needs to know. I tell him sufficient information about that traffic so he knows that what we are asking for is just and reasonable, and he is satisfied, and that is the only man that I have to convince—no one else. Once he is convinced, just as Mr. Hill outlined, because of his position as the carriers he represents, they accept his word.

Q. Do the trucking companies have similar top security clearance?

A. Where a carrier does not have a classified representative, that is, cleared for these matters, I, of course, can not tell him the details about the shipment. But then it is a matter of mutual trust and a working arrangement, and I generally find no difficulty in discussing matters with Washington representatives, cleared or not cleared, that [fol. 843] they can trust us on what we are asking for. They could, of course, always tell what the revenue is going to be merely by looking at the rate. By looking at the miles, the truck miles or car miles concerned and the loading we will establish on the shipment.

Q. You are on the chain of command that goes through General Lasher, is that true?

A. Yes, sir, I have a great many dealings personally with General Lasher.

Q. Might you have information with respect to a particular shipment that was secret in nature that General Lasher himself would not have?

A. Again, as General Lasher explained in some detail on the witness stand, security and the discussion of security moves is on a need to know basis. Everyone who is cleared for top secret does not know all the things about a top

secret movement. Unless he has a need to know, he is not told and then he is only told what he has to know. I handle many shipments which General Lasher knows nothing about, and there is no need for me to discuss them with General Lasher.

Q. Colonel, can you give some current illustration of how you arrange for a secret movement?

A. I am going to have to withhold all but skeleton facts on this situation. This movement is still taking place. I [fol. 844] can't tell you the origin, I can't tell you the destination. I can tell you this: that we were advised there would be——

Mr. Phelps: Just a minute. This may be very impressive but I submit that if security requires that the details not be divulged, perhaps we should not hear anything about it at all.

Mr. McConnell: Well, he certainly can't tell you what it was and where it was going if it is secret, but he can tell you, just to illustrate the machinery, just the general character of it.

Judge Lemmon: If you think the information would be pertinent and satisfactory without the secret details—?

Mr. Phelps: Well, I just wonder, Your Honor, whether I am not going to be badly handicapped in whatever cross examination I may want to conduct.

Judge Lemmon: I don't think your cross examination would need to go into those details.

Mr. Phelps: Very well, Your Honor.

The Witness: Again, if we are going to pursue this, I must insist that I can not give anything but just the skeleton facts.

By Mr. McConnell:

Q. Well, go ahead. I think that's all right.

A. We would have been faced on this movement, classi- [fol. 845] fication by analogy, which would have thrown us into a very high class rate structure. There are also certain arrangements to be made—emergency arrangements and airplane—discuss this matter with the freight traffic manager of the carrier concerned.

Incidentally, he did not know anything outside the origin and destination. He didn't know what the actual commodity was and I couldn't tell him what the actual commodity was.

The shipment is moving in substantial volume, trainload lots. The difference between the two rates, you might say, the class rate structure and the rate we established, which incidentally gave the carrier a revenue of over $2.00 a car a mile on the rate we did establish, was approximately a half a million dollars on that move.

Mr. McConnell: I have no further questions.

The Witness: I wonder if I could get a drink of water, Judge.

Judge Carter: Certainly.

Cross examination.

By Mr. Phelps:

Q. Colonel Flanagan, you stated that you used the same criteria in negotiating rates for some of these government moves as you would for an ethical commercial shipper. Do I understand that you apply certain criteria to determine whether or not the rate proposed is a reasonable [fol. 846] rate?

A. Yes, sir, we do. That is, in our negotiations.

Q. What are those criteria?

A. Well, I would say that approximately 90 per cent of our rates are made in comparison with a similar commodity that has similar characteristics, where there is a commodity rate already established within that territory—not necessarily, of course, between the same origin and the same destination.

In comparing that commodity rate that is established for the commercial shippers, we predicate our own rate and then we press the carrier to establish that rate.

Now, I would like to go a little further to show you how closely this thing is controlled.

We have a director from the Department of Defense stating that we can not attack a rate unless we have adequate justification to attack that rate. For a thousand ton movement or more, we must first get clearance from the

Department of Defense before we may proceed with negotiations.

Now, that's by telephone, of course, and quick.

For less than a thousand tons we have a regular form that we use, and we put on that our justification, our basis, the truck mile earnings, the car mile earnings, and all that information is reflected, and the Department of Defense [fol. 847] makes an after-the-fact review on that.

I feel that we have constantly working over my shoulder, and I must be most careful in my dealings with the carriers and must be justified in what I request.

Q. Well, do I understand that you frequently have recourse in the first instance to some commercial tariff previously established setting some commodity rate?

A. In the same general territory, yes. Now, that doesn't mean, of course, at all, that that commodity rate will fit our movement, sir. If it did fit our movement, sir, and it was a reasonable commodity rate, we take no action whatsoever.

Many instances of that kind do arise. We do not negotiate on every movement that we have, sir. We negotiate only when we think, sir, that the rate is unreasonable, sir, and the government would have to pay an unjust charge.

Q. Now, I am thinking of these instances where you do negotiate and where you have found some previously existing tariff rate unreasonable in your opinion.

Now I should like to know what are the criteria that you use to determine or to reach your conclusion that the rate which the established commodity rate would produce, or the charge which the established commodity rate would produce is unreasonable.

[fol. 848] A. First, as I said before, most of our negotiations are on the basis of what is open to the commercial shipper on the same or commodities having a similar transportation characteristic that we have. Which I think, sir, is the best test of reasonableness. The Commission says it's the best test of reasonableness, is a comparison of the same or similar commodities for the same or similar distances within the same territory.

I am certain, sir, that you are familiar with the Great

Western Sugar Company v. CB&Q case where the Commission outlined those very same principles, sir.

Q. Well, you haven't answered my question, though. I should like to know those criteria which you employ when you determine to depart from an established commodity rate.

A. We are not departing from an established commodity rate. That's what—I haven't perhaps made myself clear and I apologize, sir. We are departing from a class rate, sir, to establish what I term for the government, sir, a commodity rate.

Q. One of the examples you gave us, Colonel, was that where there was a published commodity rate in a tariff and you negotiated a rate that saved you $73,000.

A. Correct, sir, but the commodity rate published did not cover the rate—did not cover the movement of small arms——

Q. Probably not, but——

[fol. 849] A. ——from Belmont, Arizona to Hill Field. As I remember it, it was—I know it was the same territory. I can't cite to you the exact origin and destination. It was for a somewhat shorter distance. We used that as a comparison. If the shipper, a commercial shipper, was entitled to a movement of so many miles at that rate, well, sir, we certainly felt that the government was entitled to the same consideration that the commercial shipper was entitled to.

Q. Less $73,000?

A. Well, that's the difference, sir, between a class rate that we would pay. Let me point out that the commercial shipper would not have paid on that small arms movement for his origin, his destination, a class rate. He would have paid a commodity rate. That is all we tried to establish on our movement.

Q. You told us, didn't you, Colonel, that the government saved $73,000?

A. Certainly, sir; and I am happy we were able to do that. I see no reason why we should pay a so-called——— rate as Mr. Pistor called it, a class rate only for government supplies.

Judge Carter: Well, the 73,000, as I understand it, was the difference between the class rate and the rate negotiated,

and not the difference between the commodity rate that the commercial carrier paid and the rate negotiated, was that [fol. 850] it?

By Mr. Phelps:

Q. Was that your testimony, Colonel?
A. Yes.

Mr. Phelps: Well, I am sorry. I thought you had gotten $73,000. I apologize.

A. No, no, no. I am sorry I didn't make myself clear. I wouldn't be able to defend that before the Department of Defense.

Q. All right. Now, there are occasions, are there not, however, when you do negotiate a rate which you want to conclude with the carrier which is less than any previously established com-odity rate, isn't that true?

A. Well, it could be. I am not aware of a specific example of that. Just as a commercial shipper will have established for a long time a commodity rate on shipments. Conditions will change. It will be determined by the shipper that a different commodity rate is desired or needed,——

Q. Let me ask you this——

A. —and he will request the carrier for it. But generally, we have so much class rate traffic that, as I say, the majority of the cases, I would say almost 99 per cent—well, I won't go that far, but at least in the 90 per cent bracket would be on this class rate versus commodity rate bracket.

Q. Do you seek to ascertain what the carrier's costs are [fol. 851] going to be on a particular movement?

A. We do this, sir: As I pointed out on the work sheets in the final form we send to the Department of Defense, we show truck mile earnings, we show car mile earnings. We examine those earnings at the time we are requesting the rate.

This is very rough, now, that I am going to give you, but we are asking for it now. The Department of the Army is asking for this rate. We are putting up the impetus to request it.

The truck mile earnings are around about 50 cents a truck mile. We will scrutinize that thing very carefully

before we proceed. That doesn't mean we won't go for less than that. Look at the cotton piece business in the South on truck lines where commodity rates are published in tariffs that will reflect less than 50 cents a truck mile.

Q. Well, Colonel, just a moment——

A. (Continuing) If the commercial carrier has an arrangement in that territory, why, certainly we will want a rate on the same basis that the commercial carrier has his commodity rate established.

Mr. Phelps: I am going to ask that the witness' answer to that last question be stricken as not responsive.

Judge Lemmon: Denied.

By Mr. Phelps:

Q. I am going to ask you one more question, Colonel, [fol. 852] and I will ask you to answer it yes or no. If you can't answer yes or no, you are free to say so.

A. Yes, sir.

Q. Do you always in negotiating a special rate with any carrier seek to ascertain what the carrier's costs for the move contemplated will be?

Q. No, sir, we do not, sir, because every carrier has a different cost of operation. We examine the cost factors that he——

Q. (Interposing) Well, you have already answered.

A. —has obtained from the Interstate Commerce Commission, yes, sir, but I can't tell what carrier A's actual cost per mile is, sir.

Q. You spoke of state regulation as being intolerable, and as imposing a burden that would interfere with the expeditious methods you now have.

A. Yes, sir, I did. I did make that statement, sir.

Q. Is it your view your present methods are good?

A. For the same reasons outlined here before. I won't bore the Court with those reasons, sir.

Q. Do you concur in the views that have been expressed here by other witnesses that there are abuses associated with the public interest?

A. Well, like in any system there are abuses, just as Mr. Hill outlined. I remember General Lasher's testimony

[fol. 853] where he said because one child is naughty do you spank all of them.

Q. Let me read you a portion of this report from the subcommittee report on transportation dated March 1955: the subcommittee being a subcommittee of the Commission on Organization of the Executive Branch of the Government.

A. The Hoover Report, sir?

Q. It is a subcommittee, sir.

A. Yes, sir.

Q. The subcommittee of the Hoover Commission.

A. Yes, sir.

Q. Quote: "There is little uniformity among the various government agencies in the handling of Section 22. Regardless of intentions, the effect of the procedure in many departments is to foster destructive competitive practices; while the Army and the Navy reveal all accepted special quotations, some of the other departments disclose special rates only upon specific inquiry by interested parties."

Do you agree with that opinion?

A. I believe that situation has been corrected, just as Mr. Hill spoke a short time ago. There were many things—but I think in that report—it is a controversial report, of course. Not everybody agrees with it. But there are many things laid out in that report that have been corrected.

While you bring it up, two of the Hoover task force of [fol. 854] the subcommittee worked closely with my shop, and my entire files were open to them, and I am happy to say that they congratulated me when they departed from my shop.

Q. Do you agree that one of the directives under which government procurement offices operate is to obtain for the Government the most advantageous form of transportation?

A. You are talking about actual routings now, what is open, of course, to the man who is going to employ the routing.

You are partly right; just as Mr. Hill outlined, price and service. We don't buy solely on the price ticket. We buy both for the service and the price.

You buy the most economical transportation, naturally, spending the taxpayers' money, that will give us the required service, just like the commercial shipper would. I don't see any difference, sir.

Q. If you were a government procuring officer operating on a—well, strike that.

If you were charged from day to day with the responsibility of obtaining and selecting and designating the carrier and the route most advantageous to the Government in compliance with the directives of your superiors, and one carrier had a rate of $20 and another $10, which one would you select?

A. Well, the carrier that had the most advantageous rate, and if it could provide adequate service, I would select him. [fol. 855] Now, I want to point out something now in connection with this routing. I don't think——

Mr. Phelps: (Interposing) You have answered the question.

A. I would like to go a little further with this thing. I would like to go into a little more detail for the Court's own information.

Mr. Phelps: You will be given an opportunity.

The Witness: I think it's important.

Mr. Phelps: You will have an opportunity to do so.

The Witness: I hope so.

Judge Lemmon: If you have an explanation of your answer, you may go into it.

The Witness: Well, we are a little different from the commercial shipper on these routing arrangements. Now, we will say that carrier A to B has the lowest rate. He can give the service, so we use it. Now, that means another carrier between A and B does not get that business.

Now, we try equitably to divide our tonnage. This other carrier may be running from B to C, both those same carriers, so this time nothing is given to the carrier we gave the business to over here, another carrier gets it all. So in the long run you practically are able—and I am talking nationwide now—pretty well equitably to divide your tonnage so that all are taken care of. That's a re-

[fol. 856] sponsibility all routing people are charged with from Washington, D. C., the policy level there, and the policy made at the seat of the Government.

By Mr. Phelps:

Q. Let me read you one more sentence from this same report——

A. All right.

Q. —being the subcommittee of the Hoover Commission.

A. Yes, sir.

Q. Quote:

> "The various departments and agencies are flooded with reduced rate tenders designed solely to enable some carrier or group of carriers to capture government business. Evidence indicates that for some agencies at least 90 per cent of all Section 22 rate tenders fall into this category. In many cases the reductions offered are but slightly under the published rate."

There is an example in parentheses which I will omit.

> "The cost to the executive department of keeping records of these reductions and disseminating information to field officers frequently may exceed the savings in rate charges which they produce. Additionally, these rapidly changing quotations contribute to the expense of GAO freight bill audit."

[fol. 857] Do you agree with that?

A. Not entirely. As I said before, the report is highly controversial. What you are talking about is an unsolicited rate tender that we did not request.

Now, let me lay out our plan of operation, sir, and what we do in connection with that tender:

Traffic is routed. An unsolicited rate tender is received. It cuts the price.

Now, we don't change the routing on that traffic on that price cut until 30 days have gone by. That's our routing policy. We do that, of course, so that we can perform our business, sir, in an orderly manner, in a businesslike manner.

But certainly I do believe, sir, it does have some effect sir, on a possible downward spiral of rates, sir.

Q. I will read you one more sentence.

A. Yes, sir?

Q. "To the extent the abuse of Section 22 encourages destructive competitive practices, and to the extent government traffic moves at rates lower than a reasonable level, a burden is placed on other traffic."

Do you agree with that?

A. I disagree with that wholeheartedly.

Q. Very well, that answers the question.

A. And I would like to say why I disagree with it.

Judge Carter: If you disagree, you have the right to [fol. 858] explain it.

Mr. McConnell: Go ahead.

The Witness: I might point out an unofficial publication by the Interstate Commerce Commission, Transportation Economics shows that across the board the so-called Section 22 tenders that we have, that if you compare that with commodity rates—now, not same origin, same destination, but commodity rates for a commercial shipper, that for many years now, several years, that we are paying 14 per cent more than the commercial shipper.

Now, there are many reasons for that. It's understandable. That can be explained. But we are paying more than the commercial shipper.

By Mr. Phelps:

Q. Are you familiar with the report of the Interstate Commerce Commission to the chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives?

A. In which respect, sir?

Q. Dated December 22nd, 1955?

A. Can you identify the report more particularly, please, sir?

Q. It is addressed to—the report is addressed to Honorable J. Percy Priest, Chairman, Committee on Interstate.

and Foreign Commerce, House of Representatives, Washington 25, D. C. The report is dated December 22nd, 1955. It is signed, I believe, by J. M. Johnson, Acting Chairman. [fol. 859] Do you recognize it?

A. Not from that description you gave, no, sir.

Q. All right, I will read you one sentence from this report and ask you whether you agree with that or not:

> "In recent years there has been much dissatisfaction with the exemptions accorded to government shipments by Section 22. In our opinion that dissatisfaction is justified, and we are therefore in favor of amending this section.
>
> "We urge, however, that any special rates for the Government should be limited to apply only during time of war or threatened war, or other national emergencies, and that such rates be negotiated on a firm and unassailable basis.
>
> "We believe that a thorough study by Congress as to the present day needs respecting the furnishing of transportation free or at reduced rates is warranted."

Do you agree with that?

A. I disagree with it, sir.

Q. Are you familiar with the report of the so-called Weeks' Committee to the President?

A. In a general manner, yes, sir.

Q. I refer to the report of April 1955, addressed to the President and signed by Sinclair Weeks, Chairman. [fol. 860] I will read you a section from that report and ask you if you agree with it.

> "The use by carriers of that portion of Section 22 of the Interstate Commerce Act granting free or reduced rates transportation to government traffic, has given rise to abuses and evils which are not in the public interest.
>
> "It is recognized also, however, that government procurement practices and the peculiar exigencies affecting the movement of its traffic, as distinguished from normal movement in commercial channels, requires special consideration.

"For these reasons existing statutory provisions authorizing carriers to tender special government rates and fares to the United States, State and Municipal Governments, should be amended in such a way as to preserve the features which accommodate the special needs of government traffic movements, it will overcome the present abuses. Except for rates and fares subject to security, such special government rates and fares should be published in tariffs and filed in accordance with the provisions of the Interstate Commerce Act and regulations thereunder, provided that filing and publication requirements of the Interstate [fol. 861] Commerce Commission may be waived to assure application of such rates or fares on less than statutory notice or retroactively."

Do you agree with that?

A. That's a most controversial report. I don't agree with it.

Q. You understand that a member of that committee is Mr. Charles E. Wilson, Secretary of Defense?

A. I do. But the report is not final. Congress will still act on it, sir.

Q. How frequently, Colonel, if at all do you have any of these negotiated rates that you are concerned with governing the movement of freight intrastate in California?

A. I can't segregate them because we made no attempt to do that, sir, so I can't tell you, sir, and any figure I would give you, sir, would be purely out of the air.

Q. And you couldn't tell us, then——

A. (Interposing) No, I am sorry.

Q. —whether or not the rails in California——

A. No, sorry.

Q. —have quoted FAK rates?

A. I do not know. I can't tell you. In other words, I don't have this local picture. I am sorry. We had local witnesses for it.

Mr. Phelps: No further questions.

[fol. 862] Mr. McConnell: No further questions.

Judge Lemmon: That is all.

The Witness: Thank you, sir.

(Witness excused.)

Mr. McConnell: May it please the Court, Colonel Flanagan is the last witness on behalf of the Government for the substantive part of our case.

We do have this problem of demonstrating that there are certain installations in California, military installations, that are within the exclusive jurisdiction of the United States under the doctrines of the Pacific Coast Dairy case, and so forth, and that certain shipments take place between jurisdictions on this soil.

It is an ancillary part of our case. We just say that as an additional thing that will contribute to the administrative difficulties.

Judge Lemmon: There is an issue on that, is there?

Mr. McConnell: There is. We requested this simple type of stipulation, and I might tender it again.

The stipulation I would make, there are approximately 150 military installations situation within the state of California. That some of these installations are held by the United States within its exclusive jurisdiction. That in any one year an indeterminate number of shipments take place, which may either originate in an installation over [fol. 863] which the United States has exclusive jurisdiction or will terminate in an installation over which the United States has exclusive jurisdiction.

That is the general stipulation that we requested.

Judge Lemmon: Are you prepared to so stipulate?

Mr. Phelps: No, I cannot, Your Honor. As I have indicated already to the Court, I believe, and to counsel in the letter which we forwarded some time ago, the defendant here, I believe we could properly stipulate, that there are 153—whatever the number may be, I think we can stipulate that there is that number of military installations in California.

Judge Lemmon: How many do you say?

Mr. McConnell: I said approximately 153. We put in the complete list by witnesses. I just haven't counted them.

Mr. Phelps: I will say 153. There is a large number,

and I will stipulate there are 153. I think I counted then at the time counsel forwarded me the letter.

But we cannot stipulate, Your Honors, that all or any part of any one of those installations is under the exclusive jurisdiction of the Federal Government because we don't know, and because that's a highly involved question of law and it would be highly inappropriate, we feel, for us to stipulate on that subject.

We could not stipulate, either, that there is any movement of traffic between a section of terrain in one installa [fol. 864] tion that is under the exclusive jurisdiction of the Federal Government to another installation and to another segment of terrain that is there under the exclusive jurisdiction of the Federal Government.

The reason being this: as I understand the picture there are many installations in California portions of which only are under the exclusive jurisdiction. And I am not even sure that is a finally established fact. But there are indications that only portions of some of these may be under the exclusive jurisdiction of the Federal Government where other portions are not.

Now, we have no means of knowing whether these pickups and deliveries take place at those points under exclusive jurisdiction or not.

So to summarize, Your Honors, we do not feel that we can stipulate on a matter on which we have no knowledge.

Judge Lemmon: You have answered the question.

Mr. McConnell: Well, if the Court please, we will proceed with an extremely limited and streamlined proof of this part of our case, which may not be sufficient for our purpose but is the best we can do without getting into a tedious real estate problem.

Mr. Wigger: Mr. Brown, please.

[fol. 865]

J. Otis Brown, called as a witness on behalf of the Government; sworn.

The Clerk: Please state your name and occupation for the record.

A. My name is J. Otis Brown, attorney.

Direct examination.

By Mr. Wigger:

Q. What is your position, Mr. Brown?

A. I am attorney for and chief of the Land Acquisition Branch of the Real Estate Division for the South Pacific Engineers, Corps of Engineers, United States Army.

Q. What are your general duties?

A. As such I am in charge of the acquisition of all lands and interests in lands in the South Pacific Division, comprising the states of California, Utah, Nevada and Arizona, required by the Atomic Energy Commission, the Air Force for military purposes, and the Army for both military purposes and flood control, rivers and dams.

Q. How long have you held your position?

A. I have held that position since the summer of 1946. Prior to that time, from 1944 to 1946, I held a similar position with what was then the Pacific Division, which included the four states named, plus Washington, Oregon, Montana and Idaho.

For four years prior to that I held a similar position with other divisions, which incorporated all the remaining [fol. 866] states west of the Mississippi with the exception of Texas, Oklahoma and New Mexico.

Q. What do you have to do with federal jurisdiction over military installations in California?

A. Under Army regulations and Air Force regulations the Corps of Engineers has been designated as the agent for the heads of the department to secure, where requested and when requested, federal jurisdiction over the various military installations in the continental United States.

May I state here, first, when I speak of military I personally refer only to Army and Air Force. I have nothing to do with the Navy land program, which of course includes the Coast Guard and Marine Corps.

Q. And do you want to elaborate briefly on what does this work entail of obtaining jurisdiction over——

A. Obtaining federal jurisdiction over military enclaves requires a knowledge of the federal constitutional and statutory provisions pertaining to such matters, that is,

federal jurisdiction over military enclaves, and of the state constitution and statutory provisions, similar provisions in the states where such action is to be taken.

[fol. 867] Q. What records, if any, are kept in your office pertaining to the identity, mission, size and location of military installations in California and the federal jurisdictional status of these installations?

A. The division office as such is not, correctly, speaking, an office of record. As to the general real estate record, those are maintained in the district offices under the division located in San Francisco, Sacramento, and Los Angeles. It is, however, the office of records of all federal jurisdictional matters that have not been delegated to the districts.

Q. Do you have occasion to frequently consult with the California Lands Commission relative to the jurisdictional status of these military installations?

A. Very often, because of the fact that that Commission under Section 126 of the California Government Code, is charged with complete and full responsibility for acting on our applications for or acceptances of jurisdiction over military installations in the state.

Q. Mr. Brown, can you give us the general California statutes which you must look at in determining whether the United States has jurisdiction over a particular installation?

A. Since 1947, properly since 1946, but there was a one year interim under which no action was taken, when they [fol. 868] temporarily delegated this work to the Board of Equalization—since 1947, the Title I, Division I, Section 1, Article II of the California Government Code, containing Sections 100 to 126, 127, some of which are omitted, contain all of the statutory regulations in this State relative to federal jurisdiction. Prior to 1946 two sets of state laws were the government laws. The first was the so-called consent statute enacted first in 1852 and then reenacted in 1872, March 12, 1872. It was a so-called consent section whereby the State consented in the case of lands previously acquired, nunc pro tunc, you might say, and in the future, to acquisition by the federal government of lands for military purposes.

Judge Lemmon: This witness is going into a discussion of the legal phases of the title to these installations and my associates and I think it is an appropriate time to take the morning recess, and we would like to have counsel in chambers to discuss this phase of the case.

(Recess.)

The Court: You may proceed.

Mr. Wigger: Mark this for identification.

Judge Lemmon: If these are properly certified copies, why don't you offer them in evidence?

Mr. Wigger: I will offer this in evidence.

Judge Lemmon: If they are properly authenticated, they [fol. 869] should be received in evidence. The Judges are familiar with what the documents are.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 7.)

Judge Carter: Will counsel state what it is?

Mr. Wigger: These are photostatic copies of letters addressed to Earl Warren, Governor of California, from Secretary of War Henry L. Stimson and Acting Secretary of War John J. McCloy, relating to acceptance of federal jurisdiction covering military reservations in the State of California, lists of such military reservations being attached to such correspondence.

(Additional documents were thereupon marked, respectively, Plaintiff's Exhibits No. 8, 9 and 10 in evidence.)

Mr. Wigger: Government's Exhibit 8 relates to the jurisdiction of the Sierra Ordnance Depot.

Mr. Phelps: Do I understand that that is a certified copy?

Mr. Wigger: There is no certification on this letter.

Mr. Phelps: All right.

Mr. Wigger: Government's Exhibit 9 relates to the Oakland Army Base.

Government's Exhibit 10 relates to Camp Stoneham.

Judge Lemmon: If there is no objection to the authenti- [fol. 870] cation of these documents, Government's Exhibits 7 to 10, inclusive, will be received in evidence.

(Additional documents were thereupon received in evidence and marked, respectively, Plaintiff's Exhibits No. 11, 12, 13 and 14.)

Mr. Wigger: Government's Exhibit 11 relates to the Naval Supply Depot at Oakland.

Judge Lemmon: The same order as to that exhibit.

Judge Carter: I take it you are now coming to naval installations as distinguished from the Army Air Force.

Mr. Wigger: Yes. Government's Exhibit 12 relates to the acquisition of certain lands by the Navy in the City and County of San Francisco and used as a depot of supplies for the United States Marine Corps.

Judge Lemmon: Let it be received.

Mr. Wigger: Exhibit 13 relates to certain facilities of the Naval Air Station, Alameda.

Judge Lemmon: Same order.

Mr. Wigger: Government's Exhibit 14 relates to certain additional facilities at that station.

Judge Lemmon: Same order.

Mr. McConnell: May it please the Court, there has been considerable difference of opinion among learned counsel, specialists in real property matters, particularly with reference to the government real property holdings, with [fol. 871] respect to the precise status of these various installations which are involved in the documents that we have submitted. If the Court would kindly take judicial notice of the pertinent factors relating to these various installations,——

Judge Lemmon: The three judges of this court are aware of the differences of opinion and will take judicial notice of any of these pertinent factors, if you will just call them to the court's attention.

Judge Carter: Then you have no further questions of this witness?

Mr. McConnell: No further questions of Mr. Brown.

Judge Lemmon: Is there any cross examination in view of what has occurred?

Mr. Phelps: No questions.

UNITED STATES RESTS

Mr. McConnell: The United States rests.

MOTION TO DISMISS ACTION AND DENIAL THEREOF

Mr. Phelps: If Your Honors please, I would request an adjournment until the afternoon before the defendant goes forward, but I should like to make a motion at this time. The defendant at this juncture, the plaintiff having rested, renews its motion that the complaint be dismissed.

Judge Lemmon: Dismiss the complaint or the action?

Mr. Phelps: Dismiss the action. We resubmit to the Court all the grounds set forth in our motion to dismiss previously filed and argued, and in addition thereto, we now, the evidence of the plaintiff having been heard, urge [fol. 872] that the action be dismissed for the reason that the plaintiff has failed to make out a prima facie case and has failed to prove by a preponderance of evidence the allegations of its complaint.

Judge Lemmon: The motion is denied.

We will take the recess, if you so wish, until 2:00 o'clock.

(Whereupon an adjournment was taken to 2:00 o'clock p.m.)

[fol. 873] AFTERNOON SESSION, THURSDAY, MARCH 22, 1956 at 2:00 P.M.

Judge Lemmon: You may proceed.

STATEMENT OF MR. PHELPS

Mr. Phelps: Your Honors please, I should like to make a very brief opening and outline, if I may, the points that the defendant will prove.

We expect to call two witnesses, possibly a third. One of our witnesses, I believe the first one we will call, Mr. Loretz, is a man whom we will qualify as a man of long experience in rate matters; he is presently a tariff publishing agent. He will testify in support of an exhibit which he has prepared which will show, over a period of years,

recently beginning in 1952, up to the present, there has been a steady deterioration of the rates for the transportation of government traffic in California, particularly transportation performed under the so-called FAK rates.

He will point out and explain that exhibit and the significance of it and how it was put together, the sources from which it was drawn. He will also have something to say about the nature of FAK rates and other matters in connection with his proposed exhibit.

We will also call Mr. Mulgrew, who is the chief of the Commission's—he is the director of the Commission's Division of Transportation. He is in charge of the entire transportation division of the California Public Utilities [fol. 874] Commission. He has some 200 odd men working under his supervision, and he is the man who is charged with the responsibility of advising the Commission on policy matters affecting all transportation matters in California. He will give us a history of the regulation of carriers in California, briefly, and he will tell us something about the background of the legislation, what led to it, the legislation that resulted in the amendment of Section 530 of the Public Utilities Code, the reasons for it, and the effect of it.

We may possibly wish to call a third rate man from the Commission's staff who will testify concerning certain rates that are established in the California Public Utilities Commission, minimum rate order No. 2.

Mr. McConnell: May it please the Court, it has occurred to us his acting as technical advisor for government counsel, he was not a specialist on rates at all. Mr. Broz is a member of the California bar, is a member of the Interstate Commerce Commission bar, and I imagine of the Public Utilities Commission bar.

(Colloquy between counsel, inaudible to the reporter.)

Mr. McConnell: The Federal District Court. And may it please the Court, we would like for Mr. Broz to appear of counsel for the United States. We think it would save time if he just participated directly in the cross-examination.

[fol. 875] Judge Lemmon: That is satisfactory.

Mr. Phelps: I should have said also, Your Honors, that before calling any witnesses I should like to offer in evidence certain documentary material which has previously been referred to.

I should first like to offer in evidence a pamphlet consisting of 126 pages, which is entitled, "Commission on organization of the Executive Branch of the Government, Transportation, a report to the Congress, March 1955."

Mr. McConnell: This is the Hoover report?

Mr. Phelps: Yes.

Mr. McConnell: We take it that this is under our motion to strike that was reserved?

Judge Lemmon: Be received subject to that right.

The Clerk: Defendant's Exhibit C in evidence.

(Whereupon the Hoover report referred to above was received in evidence and marked Defendant's Exhibit C.)

Mr. Phelps: I should also like to offer in evidence a document consisting of 362 pages entitled, "Commission on organization of the Executive Branch of the Government, Subcommittee Report on Transportation, March 1955."

Judge Lemmon: Subject to the same reservations, it will be received.

The Clerk: Defendant's Exhibit D in evidence.

[fol. 876] (Whereupon Commission document referred to above was received in evidence and marked Defendant's Exhibit D.)

Mr. Phelps: Next, I should like to offer a pamphlet consisting of 19, or rather 20 pages entitled, "Revision of Federal Transportation Policy. A Report to the President, prepared by the Presidential Advisory Committee on Transport Policy and Organization, April 1955."

Judge Lemmon: Same order.

The Clerk: Defendant's Exhibit E in evidence.

(Whereupon Presidential Advisory Committee Report referred to above was received in evidence and marked Defendant's Exhibit E.)

Mr. Phelps: Your Honors, I should like to offer a letter dated December 22, 1955, addressed to the Honorable J. Percy Priest, Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington 25, D. C., forwarded by J. M. Johnson, Acting Chairman of the Interstate Commerce Commission.

Judge Lemmon: Same order.

The Clerk: Defendant's Exhibit F in evidence.

(Whereupon letter of 12/22-55, Johnson to Priest, was received in evidence and marked Defendant's Exhibit F.)

Mr. Phelps: Next, I should like to offer a letter dated [fol. 877] April 13, 1951, from the Comptroller General of the United States, addressed to the Administrator of General Services, signed by Frank L. Yates, Acting Comptroller General of the United States.

Now, I should like to offer another letter dated October 19, 1954, from the Comptroller General of the United States addressed to Mr. P. M. Shoemaker, Chairman, Committee on Transportation, Commission on Organization of the Executive Branch of the Government, signed by E. L. Fisher, Acting Comptroller General of the United States, and may I say, Your Honors——

Judge Lemmon: Same order on those two exhibits.

Mr. Phelps: These two copies I have have been lent me, and I feel obliged to return them. May I suggest that we receive them now in evidence and I should request a stipulation of counsel that we be able to photostat them and substitute the photostats in evidence.

Judge Lemmon: If there be no objection, that will be the order.

The Clerk: Defendant's Exhibit G and H in evidence.

(Whereupon letter of 4/13/51 from Comptroller General to Administrator of General Services was received in evidence and marked Defendant's Exhibit G; letter of 10/19/54 from Comptroller General to Committee on Transporta- [fol. 878] tion was received in evidence and marked Defendant's Exhibit H.)

Mr. Phelps: I believe I have already submitted to counsel, and I am not sure I have to the clerk or not, a

pamphlet entitled, "Rules Governing Filing and Posting of Tariff Schedules for Gas, Electric, Telephone, Telegraph, Water and Heat Utilities, General Order No. 96, Public Utilities Commission, State of California."

I have here certified copies of that document which I should like to offer in evidence.

Judge Lemmon: Same order.

The Clerk: Defendant's Exhibit I in evidence.

(Whereupon General Order No. 96 referred to above was received in evidence and marked Defendant's Exhibit I.)

Mr. Phelps: I should also like—it will be a little bit later, Your Honors, to request that we make a part of the record certain certified public documents which we annexed to our motion to dismiss as a part of the appendix. I am not at this point able to identify them particularly, but a little later on before the defendants close their case, I will be able to do so.

May I call my first witness?

Judge Lemmon: You may.

Mr. Phelps: Mr. Loretz.

[fol. 879]

TAL LORETZ, called as a witness on behalf of the defendant; sworn.

The Clerk: Please state your name and occupation for the record.

The Witness: My name is Tal Loretz; occupation, Traffic and Transportation consultant.

Judge Lemmon: For whom? You said you were consultant, transportation consultant; you didn't tell for whom.

The Witness: Well, I am appearing here at the request and on behalf of the Public Utilities Commission of California. My profession is that of consultant to various industrial organizations and carriers.

Judge Carter: What you mean is you are self-employed, you are a professional consultant in traffic and transportation, and your services are engaged by various organizations.

The Witness: That is correct, sir.

Direct examination.

By Mr. Phelps:

Q. Would you describe, Mr. Loretz, your training and experience in traffic and transportation and in tariff publication?

I have been engaged in traffic and transportation since 1919, for some 13 or 14 years as traffic manager and transportation manager of a large industrial concern in the Los Angeles area, and from 1933——

Q. Excuse me, may I ask the industrial concern for whom [fol. 880] y i were representative?

A. That would originally be Llewelyn—L-l-e-w-e-l-y-n—Iron Works at Los Angeles, which later became consolidated with Consolidated Steel Corporation, and which subsequently became an entity of the United States Steel Corporation.

Q. All right, pardon the interruption. Go ahead.

A. In 1933 I opened an office as traffic and rate consultant, and since that time continuously to the present, with the exception of the war years when I was in the service, I have acted as traffic manager, traffic consultant and adviser for various industries in the routing and the rating of their freight as well as for various motor carriers and some other agencies of transportation in advising them in a like manner, handling certain matters for them with the regulatory bodies, and in the later years, since the passage of the Motor Carrier Act of 1935 and the amendment to the California Code at about the same time, have included tariff publishing activities for motor common carriers, both individually and as an agent for groups in my work.

Q. Are you familiar with transportation rates in California?

A. I am in a general way, yes, sir.

Q. What tariffs do you publish, Mr. Loretz?

A. Tariff as distinguished from government quotations. I public- a tariff in California for interstate freight carriers conference, which is an industry-owned organization [fol. 881] of motor common carriers, which is known as California Common Carrier Tariff No. 1 and is statewide in application.

I publish various individual tariffs. I publish an agency tariff of rates in Southern California.

I publish various interstate tariffs, filing them with the Interstate Commerce Commission, having application on interstate traffic within California and from and to California.

Q. I show you a document, Mr. Loretz, consisting of 46 pages, entitled, "United States Government Rate Quotation No. 2 of C. R. Nickerson, Agent, Pacific Coast Tariff Bureau, and Supplement No. 50 U. S. Government Rate Quotation No. 1 of T.L.A. Loretz, Agent", and I will ask you whether or not this document contains the special rate quotations which you publish on behalf of certain motor carriers in California.

A. That's correct.

Q. Am I correct, Mr. Loretz, in my understanding that you at one time had a tour of duty in the United States Army?

A. Yes, sir.

Q. Will you describe that experience, please, and your duties and responsibilities?

A. Well, I was a reserve officer and went on active duty in 1942 as a major in the ordnance department of the Army, and after a brief tour of duty in the states in procurement work for the ordnance department I applied for and re- [fol. 882] ceived a transfer to the Transportation Corps;

And after a brief period of training in the states, served in the European theater as a base section assistant transportation officer, and in other capacities, and finally as an executive officer to the Chief of Transportation of the European Theater.

I was returned from Europe and was released from service in 1946 with the rank of Colonel. I am now—I continued reserve activities for some time subsequent to the war, but recently was transferred to the retired reserve.

I would like to make it clear, if I may, to the Court that in none of my service in the military did I ever have experience in the negotiation of rates or in the routing of traffic within the United States.

Q. Mr. Loretz, you have already described yourself as the publishing agent for this tariff which I identified a

moment ago as that of yourself and Mr. Nickerson. Do you publish any other special rate quotations?

A. Yes, sir, we do publish two special quotations which are primarily interstate in application but do, I believe, have some California intrastate application. They are for specialized movements of jet engines.

Q. Now, Mr. Loretz, I am going to ask you to describe to the Court, if you will, how these special rate quotations come into being and what they contain in a general way.

[fol. 883] First, with the Court's indulgence, I would like to explain that in the state of California there are a large group of carriers who by statute are not required to file tariffs with the Public Utilities Commission, although they are as to commercial traffic subject to the minimum rates of the Commission.

Insofar as government traffic is concerned, however, their only way of placing themselves on record with the Department of Defense and its agencies is through the filing of what they call a government rate tender.

That may be done either by the carrier individually or may be handled through an agent in a single publication in which a number of carriers participate.

That is the background for the formation of and the filing of the government quotation of Mr. Nickerson and myself, which happened to have been consolidated back in 1953, and also would apply to other government agency quotations which are in effect in California.

Q. Now, would you tell us a little more, if you will, the step by step procedure that the carriers follow in coming to you or to the government first, if that is the fact, and what happens after the special quotation has been proposed by a carrier? Describe the procedure which he follows and which you follow in making that rate available to the Government.

A. Well, we necessarily have what we call governing rules [fol. 884] of procedure under which our particular bureau operates, which I will try to summarize as follows:

It provides that upon the request of the Government, or of any one of the participating carriers or any other interested parties, that the carriers will give group consideration to a rate proposal, and that is usually handled by a

mail submitted to them because they are situated generally throughout the state of California, and/or at the request of any three members a special meeting can be called and held and group action directed to the agent to be taken if the vote on the matter is affirmative, or if it is approved in some amended form.

That is one way in which a rate may be arrived at for publication and filing with the military.

Another way is by way of independent action filing. We of course set up on our rules of procedure a proviso that regardless of the majority vote on any particular rate proposal, that the right is reserved to any participating carrier to take independent action in any way it may elect, regardless of the wishes of the other participants.

So the agent would also and does also receive instructions from individual carriers to make publications for their sole account.

That is done subject only to advising the other participants in the quotation that such independent action has been [fol. 885] directed, so that any of them who may feel it necessary to meet that for competitive reasons to enable them to participate, continue to participate in traffic, may do so.

When the rates are finally instructed to the agent by the individual or the group instruction, they are printed up in tariff form and filed in the required number of copies with each of the military services in Washington.

Q. Now, stop right there, Mr. Loretz. How many copies of the special rate quotation that you publish do you forward to the military agencies? I mean how many agencies do you forward copies to?

A. Well, we forward them to the Department of the Army in whatever their required number of copies may be. I don't have that figure in mind. The same to the Department of the Navy, and separately, I believe, to the United States Marine Corps Headquarters, and separately to the Department of the Air Force, and I believe separately to the Air Materiel Command at Dayton.

Q. How about the General Services Administration?

A. The General Services Administration as well. I might say that certain government rates are restricted in application to military traffic, but largely they are not.

Q. Do you make any effort, Mr. Loretz, to pass upon the reasonableness of the rate that is offered to you by a carrier or group of carriers?

[fol. 886] A. That is not my function, sir. We do, however, undertake to furnish the necessary technical advice and information to enable the carriers to intelligently consider the proposed rate.

When I say technical advice and information, I am referring specifically to getting the rates which may apply on commercial traffic of the same nature, and either precisely or roughly between the same points, the rates which may be on file with the military to the extent that we are able to ascertain them for account of competing carriers.

We furnish them, in some cases, with the competitive railroad rates, whether in tariff form or in the form of government quotations.

[fol. 887] In other words, we try to give them the whole picture that we know by experience that they require in order to intelligently determine whether the proposed rate is a good rate for the customer, in this case the military, as well as for themselves from a revenue standpoint.

Q. Is it fair to say, Mr. Loretz, that your primary function is to serve as the channel or the means through which these proposed quotations are made known to the government agencies interested?

A. Yes, sir. I would like, if I may, Mr. Phelps, while we are getting into this matter of rates, I think what I would like to say here in connection with the subject of rate making has been much better said by the Honorable Howard Fries, Member of the Interstate Commerce Commission, and formerly of the Public Utilities Commission, here in a talk which he delivered before a common carrier group that I attended in January.

Q. Are you going to give this now as a view which you adopt as your own?

A. Yes, sir.

Q. Proceed.

A. "Rate making is a technical and involved, as well as an extremely important activity. It has many facets. A rate may be objectionable either because it is too high or because it is too low. One that might seem proper when

[fol. 888] viewed by itself will not fit into the overall picture and thus may produce highly undesirable results. Rate making has been referred to as a pragmatic business. By this is meant no doubt that in a rate structure the individual considerations are so balanced and interdependent that a manipulation of a part calls for a consideration of the whole, and that the proper functioning of the whole depends upon the adequacy of the parts. This interdependence is not limited to the rates of a particular carrier. It applies to the entire structure for the whole transportation business."

As I said, I believe that expresses far better than I could the picture that the making of rates in traffic assumes in California, and the need for some interdependence and some type of regulation, if you please, on government traffic because it is only part of the overall traffic movement.

Q. I am going to ask you to describe briefly, if you will, Mr. Loretz, the makeup of these special rate quotations, and I ask you to use your own as an example. Tell us in general what the contents of that publication are. It won't be necessary for me to offer that in evidence, but I would like you to describe the form and the contents of it.

A. It has a title page which purports to show what is in [fol. 889] the book, that is, both by commodities and by territory, which that particular quotation covers, and, of course, an index and a list of the participating carriers.

Q. Let me interrupt you one moment. Isn't it true that that publication of yours containing special rate quotations is constructed in the same way as tariffs available in commercial traffic?

A. We follow, generally speaking, those but with minor exceptions, the rulings of the regulatory bodies. It lists the participating carriers and the authority or the power of attorney by which the agent, in this case either Mr. Nickerson or Loretz, acts for that carrier. It carries the usual explanations of all abbreviations, technical terms, and refers to governing publications, which is important if all of the governing rules of a tariff applying statewide—and I am using the term "tariff" loosely; I am thinking of quotations as well as tariffs—if they were all in one volume,

it would be a pretty voluminous document, so it is cus
tomary to incorporate by reference a governing classifica
tion, which is itself a document of several hundred pages
classifying all articles for freight classification purposes
Q. Is that the so-called western classification as used
in the western part of the country?

A. In California the so-called western classification i
used, yes, sir. There is an application of rate section, whic
[fol. 890] gives the general rules governing the applicatio
of rates and provides for such ancillary service such a
the supplying of dunnage, extra labor, fork lift service, an
setting forth minimum charges and any restrictions in th
routings or service restrictions, if any.

Then it states any exceptions to the classification. B
that I mean to the extent the western classification ma
be departed from in this particular tariff, either as to th
entire territory or as to the specific movements. Thos
exceptions are listed.

There is an extensive class rate section listing the clas
rates which, by the way, are the rates prescribed as mini
mum by the California Public Utilities Commission.

Q. Stop right there, Mr. Loretz. Do I understand fro
that testimony that the class rates which you have publishe
in your special rate quotation are on the same level as th
rates prescribed by the California Commission?

A. That is correct, prescribed for minimum quotation b
the California Commission.

Q. Go ahead.

A. There is following that an extensive commodity rat
section which names the rates on particular commodities
In a general rate tariff that would include everything fro
apples to zebras, so to speak, from A to Z. In the case o
the government quotation for California that includes am
[fol. 891] munition, asphalt, brass, buildings, canned goods
cans, cartridge cases, coffee, drums, and specifically all o
those articles which the government ships within Cali
fornia and reflecting rates which are departures from th
class rates which the carriers have either voluntarily es
tablished or which they have granted to the military an
published upon application and consideration.

In addition to those extensive specific commodity rate

on which, by the way, I only went up to the letter of D as illustrative, they publish a series of rates on freight, or as it is usually called, FAK, or freight all-kinds.

Q. In that respect that special rate quotation tariff differs from the tariff applicable on commercial shipments?

A. That differs in that—I would say principally in that respect in that there are no freight all-kinds rates incorporated in the Commission minimum rate structure, at least for any long distances.

Q. Is it fair to say, Mr. Loretz, that anyone seeking to ascertain a rate prescribed by your special rate quotation would have to go through very much the same motions as he would go through to find the rate in any other tariff?

A. That as a general statement, yes.

Q. How long have you been engaged in this business of publishing section 22 and special rate quotations for the Government?

A. Only since May 1952.

[fol. 892] Q. Are there any other agents of publications of produced rate quotations for government traffic for carriers operating in California that you know of?

A. Yes, sir, there are. In addition to the one which is now a joint publication of Mr. Nickerson and myself, there is one published by Agent J. L. Beeler in Los Angeles, which has a number of participants and—would you like me to identify that for the record?

Q. I think I can do it, Mr. Loretz. I hold in my hand a document consisting of 81 pages entitled "J. L. Beeler, Agent, Supplement No. 22, Local U.S. Government Quotation No. 1-A, naming class and commodity rates for the transportation of freight between points in California and rules and regulations governing same for the account of participating motor carriers as shown herein."

I will ask you if that is a publication containing much the same kind of rate matter as you have described with reference to your own.

A. Yes, sir.

Q. I will show you a third one consisting of 20 pages entitled, "Elmer Ahl, Agent, Pacific State Motor Tariff Bureau, Supplement No. 3 to U.S. Government Quotation No. 3-B, naming rates for the transportation of freight

(other than petroleum products in bulk) between all points and places in California."

[fol. 893] Is that a third publication containing special rate quotations with which you are familiar?

A. It is, sir, with the exception, I believe, you incorporated in your description the supplement No. 3 appearing on that particular page. I believe it should be properly identified as Elmer Ahl, Agent, Government Quotation No. 3-A as supplemented, and the same would be true as to Mr. Beeler's.

Q. I accept your corrections.

Are these two special rate quotations, that of Mr. Ahl and Mr. Beeler constructed very much the same way as your own?

A. Very much the same.

Q. In addition to these special publications that we have described, are there any individual carriers who file special rate quotations with the government?

A. Yes, sir.

Q. Can you tell us, Mr. Loretz, when this practice of filing special rate quotations with the publishing agent commenced?

A. That commenced some time prior to my time in that particular branch of the field. As I recall, it was back around 1948 when Agent Beeler published his. I can only speak of my own knowledge starting in somewhat prior to May 15, 1952 which is the day my own was published, or [fol. 894] became effective.

Q. Have you made a study, Mr. Loretz, of the level of government rate quotations that have been filed, rather, have been made available to the military services during the past few years?

A. I have, sir.

Mr. Phelps: I have in my hand, Your Honors, a document consisting of a number of pages that don't appear to be numbered consecutively, entitled "Exhibits showing trend of motor carrier freight rates on government traffic within the State of California between representative points, period May 15, 1952 to March 26, 1956."

May that be marked for identification as the next exhibit?

Judge Lemmon: Have you made a copy available to government counsel, and a copy for us?

Mr. Phelps: Yes, Your Honor.

The Clerk: Defendant's Exhibit J for identification.

(Whereupon "Exhibits showing trend . . . " was marked Defendant's Exhibit J for identification.)

By Mr. Phelps:

Q. Do you have before you, Mr. Loretz, a copy of the document I have just described?

A. Yes, sir.

Q. Was that prepared by you or under your direction and supervision?

[fol. 895] A. By me and—in part, and under my supervision in part.

Q. Now, I am going to call your attention, first of all, Mr. Loretz, to the title page where you have used the phrase, representative points. I am going to ask you to tell us, if you will, your reasons for considering the points you have indicated as representative.

Judge Lemmon: Do you have any extra copies of that?

Mr. Phelps: Yes, Your Honor.

Judge Lemmon: Like to have two of them.

(Counsel passing documents.)

The Witness: I believe there is a pending question, Mr. Reporter. May I have it again?

(Record read.)

A. Naturally in undertaking a study that would be useful and not be made up of rates which are in the tariff but not generally used, I felt it necessary to determine what would be representative points of movement on government traffic, and where possible, movements which would be representative of both government traffic and commercial traffic.

By Mr. Phelps:

Q. In the body of your study you have shown some data respecting movements between San Francisco-Oakland, on the one hand, and the Los Angeles area, on the other hand. That is one. You have indicated moves between San Francisco-Oakland on the one hand, and San Diego on the other. [fol. 896] A move between Port Chicago and Seal Beach for ammunition; a movement for freight all-kinds between Barstow, on the one hand,—the Barstow area—and the San Francisco area, on the other hand; another between the Barstow area and Camp Pendleton; another between the Keily Air Force in Maywood and McClellan Field in Sacramento; another from the San Diego area to the Los Angeles area.

I will ask you if those are the points and the movements between points which you consider as representative.

A. Those are the points that I considered as representative, and I might say that my basis for considering them representative was my experience over the past four years in rate meetings and in considering rate changes and known competitive conditions between those particular points and on those commodities, and in order to confirm that, I called in four of the carriers for whom I publish, and asked them to look at them and to confirm that they were representative or typical points of movement, or if not, to give me others, and they did confirm that all of these were representative, at least as to certain of the carriers engaged in government traffic; and they furnished me also with certain others which time did not permit including in the study.

Q. I will ask you to turn to the first inside page, page A, Mr. Loretz. There you have set out explanations of certain symbols that occur throughout the rest of the study, [fol. 897] have you not?

A. Yes, sir. In the interest of brevity and avoiding making each of the separate parts of the exhibit too complicated, I attempted to use uniform symbols and abbreviations and explain them all at one time. Would you like me to go into any detail as to those at this juncture?

Q. There are one or two I should like to have you to do

so with respect to them. Now, first one is at the top of the page, of page A, Note 1, where you have referred to truckloads, and in parenthesis, "The lowest rate subject to highest minimum weight only shown." Would you explain what that means?

A. Yes, sir. We have attempted in this study to make it show just one thing, the trends in rates rather than in a complete study of the entire rate structure, which certainly have been more confusing than helpful to this issue, and so we have taken in connection with the freight all-kinds rates that we have studied only the lowest rate subject to the highest minimum weight. I might explain to the Court that the freight all-kinds rates in California since the time I have had any experience with them, have been generally subject to a 20,000 pound load that would be subject to one level of rate, a 30,000 pound load or shipment would be subject to somewhat lower basis. and either a 36,000 or 40,000 pound load or shipment, which is normally the high-
[fol. 898] est for a truckload movement is accorded a still lower rate. So it would seem to me that for the purpose of illustrating trends it would be proper to take the lowest rate and the highest minimum between the points studied, and that has been done, with the exception of Part 7 of the exhibit, which I will explain as an exception when I come to it.

Q. Now, opposite Note 4 you have stated that it is not purported that all individual quotations are shown. Those shown are typical. Now, would you tell us why, in your opinion, the ones you have shown are typical?

A. Those were the quotations which were readily available in my own particular files and the extent that they—I might say that these individual quotations are only made available to an office like mine through military channels after either an agency or individual rate tender has been received and accepted by the military in Washington; they transmit not only an acknowledgment back to the person who sends it in, but they also send copies to the agents and the other individual carriers who are known to have a competitive interest.

Q. Excuse me. Go ahead.

A. So our file is fairly complete as to these competitive

quotations, but we don't know that it is—in fact, I know that it isn't 100 per cent complete. As an illustration of that, I was missing in the compilation of this study this [fol. 899] week one typical carrier quotation that I knew existed, and which I obtained a copy of in San Francisco and have added it on page 10, part 2, as an assertion.

Q. We will come to that a little later, if we may.

Are we to understand now from your testimony with respect to these individual quotations, that those in the first instance are not forwarded to you, but are forwarded directly to the government traffic agencies?

A. That is correct.

Q. And afterwards you get hold of them?

A. Actually, after they are in effect.

Q. Yes.

A. And that is important because that is too late for the other carriers to take any immediate competitive action if they were so inclined.

Q. Yes. Now, before we leave this Page A, I think it might be well to point to the Court the symbol M over to the right of the page because frequently in the body of it, as meaning minimum weight of a thousand pounds, and in the lower lefthand corner you have indicated the abbreviation which you have used for various carriers; have you not, Mr. Loretz?

A. Yes, sir.

Q. I will ask you why you selected these carriers whose names appear on that page.

[fol. 900] A. Those are carriers that were individually parties to certain rates as an exception to the general rate structure and where we have used a rate that applied only via a single carrier, we felt it proper to indicate that carrier by abbreviation in the rate study itself and identify those carriers more clearly by name on this page.

Q. Now, if you will turn to the next page, this is part 1 which consists of two pages, as I understand it.

You have shown here data with respect to movements which take place between the San Francisco-Oakland area and the Los Angeles area, and which move under a freight all-kinds quotation. Now, we have heard a great deal about

freight all-kinds, Mr. Loretz. I think we all now have a fairly clear understanding of what it is.

It might be well for you to tell us very briefly what in your use of the phrase is comprehended.

A. Well, the term freight all-kinds as used in this study means exactly what it says, but subject to certain specific exclusions which are published in the individual quotations here in connection with the individual rates that are cited here.

I would say that, generally speaking, the exclusion means just exactly that, freight all kinds except ammunition and explosives and sometimes refrigeration articles or other articles requiring special equipment.

[fol. 901] And at various times covered by this study—but this is not true as of today—they contained restrictions as to the cube of the freight which would move under the freight all-kinds rate.

In other words, the carriers endeavored to reserve to themselves some protection in connection with moving freight all-kinds under a single rate by saying that it would only apply on freight weighing more than 15 pounds per cubic foot or some similar figure.

I believe it might be proper to elaborate just a little bit to give the Court an understanding of rate-making.

This classification, this western classification that I spoke of a few moments ago, and which I presume has been referred to in the prior sessions, is a classification based on 50 or 75 years of experience, classifying all the articles which commonly move, both from the military and commercially into appropriate classes—first, second, third, fourth, at less than truckload lots, or in somewhat greater divisions of classifications as to truckload freight.

Many of the ratings are prescribed by the Interstate Commerce Commission. Many of them are merely part of the classification and have come to apply over the years.

When you establish a freight all-kinds rate, you in effect throw the book out the window. You say that regardless of whether it's a steel billet or steel bar, on the one hand, or [fol. 902] it's a mattress or an airplane wing or something, on the other, that we move them both at the same rate. I think in equity, at least on the face of it, to that type of rate-making will be obvious to the Court.

So the carriers have attempted at different times to set up some protection to themselves whereby, whether it be a steel beam or a mattress, why, they could be assured of a certain amount of minimum revenue per loaded mile.

That is one phase. I have dwelt on that at some length because that is one phase of the deterioration of the California government rate structure which can not be expressed just in figures.

Q. Yes. Now, have you any opinion, Mr. Loretz, as to the validity or as to the merit of a freight all-kinds rate quotation as applied to various kinds of moves?

A. Yes, sir, I have. I have my opinion, and my opinion is that the same rate applicable to the steel beam and the bulky airplane wing is, on its face, wrong.

Now, there may be some conditions on particular movements where it isn't wrong. But I do say that it is so obviously wrong from a strictly rate-making viewpoint that the carrier should go very, very carefully in establishing any freight all-kinds rates, and that there should be some regulatory agency which could determine if and when there may be some special conditions to justify freight all-kinds rates [fol. 903] and if there is any reason for them, to tie them down appropriately so as to avoid a burden being placed on other traffic which the carrier has to move, not only for the government but for the public at large.

Q. On a movement that is made up of many different kinds of items, would you recognize some merit to the freight all-kinds quotation for that kind of move?

A. Yes, sir, I can conceive from the military standpoint, we will say, if an entire division is being moved from one location to another, it might be expedient for both the shipper and the military, as well as the carrier, to just have one rate on military impedimenta, and to take the good with the bad and average it out; so to speak, as any contractor might do in any other field.

Q. Yes?

A. But I would like to point out particularly that your freight all-kinds rate, as they have been in effect in California for the past several years, they go way beyond that purpose. They apply on the whole load of steel bars or they apply on a load of mattresses.

Q. A single item——

A. (Interposing) It isn't a question of balancing your load between the two and avoiding a minute description of the entire shipment. It's a question of a rate which, if it's a good rate for one, it is obviously a bad rate for the other [fol. 904] article, all of which is included within that broad description.

Q. Have you any opinion as to whether or not the use of an f.a.k. rate has been abused in California?

A. I would say that it has.

Q. And does the abuse consist of the use for shipments consisting of single items or a small number of items?

A. No, sir.

Q. And obtaining the low freight all-kinds rate on a type of commodity for which it is not suited? Is that one of the abuses that has resulted in California?

A. That is one of the abuses, yes, sir.

Now, may I say, sir, that as a witness for the Commission, I feel impelled to say that it certainly shouldn't be prejudged that all rates on a freight all-kinds basis are wrong or that they might not be proper to certain unusual circumstances. But they certainly should be scrutinized most carefully, and I don't know of anyone other than an impartial regulatory body that can resolve the problems that have developed here in California through the use and abuse of freight all-kinds rates.

Q. Now, coming back to the study again, Mr. Loretz, I think it is largely self-explanatory, but I should like to have you point out some of the significant phases of it.

[fol. 905] A. I think that can best be done on part 1, the freight all-kinds between the San Francisco-Oakland area and the Los Angeles area.

The significance of the May 15, 1952 date is that that is the earliest date that falls within my personal knowledge, and was the effective date of my own quotation. Two of the other quotations existed prior to that time.

At that time, by a form of informal negotiation with the military, the freight all-kinds rates were established with the lowest one of them being, and the highest minimum being the fifth class basis on a 40,000 pound minimum.

I might say for the information of the Court that the

fifth class is a rate which is given to such articles and truckloads and carloads in rating as the iron and steel beams and certain unusually heavy articles. And so that this class in itself, in my opinion, was a concession to the military to take in freight of all kinds subject to minor exceptions. But that was acceptable to the military at that time. So we have the 45 cent rate on a 40,000 pound minimum between those points.

Q. Excuse me. All of your figures here are a cent on a hundred pounds, is that right?

A. Yes, sir, all rates are in cents per hundred pounds, and the minimum 40M has already been explained. That stands for 40,000 pounds.

[fol. 906] Over on the righthand side, the California Public Utilities Commission minimum, as in effect at the time, is shown. That was 45 cents. And it is noted that the rates were 45 cents via all carriers in all the agencies, and that was the same as the Commission's fifth class rate.

Q. Does that show that there has been a steady deterioration or falling of the great—the freight all-kinds rate, as compared with a rising of the California PUC rate?

A. The part 1 as a whole does, I think, clearly reflect that situation from the last time the rates were uniform, that is, straight across, on October 1st, 1953. From that point on in this part and in the other parts of the exhibit there is a steady deterioration of rates, while of course the Commission's minimum rate applicable to commercial traffic, fifth class commercial traffic, moved steadily upward, based upon findings of the Commission reflecting the increasing cost of operation.

Q. May I ask you one question, Mr. Loretz? Do the rates which are shown include loading and unloading by the carrier?

A. In a limited way, yes. I think those rates include the furnishing of the driver only, and that any labor over and above that is customarily furnished by the shipper.

Q. Now, you were going to, I believe, supply an additional figure on the second page, part 2, were you not, Mr. [fol. 907] Loretz?

A. I believe it is on page 1 of part 2 that I inserted in ink in the several copies that have been distributed here,

under the column "Others" the date August 25, 1954, and rates of 32 and one-half for northbound——

Q. Just a second, Mr. Loretz. I am not sure, I don't think I have the right place. This is on part 1, page 1, is that right?

A. That is right.

Q. Opposite the date 8/1/54 in the next to the last column, is that right?

A. That is right.

Q. Now, what is the figure that we should have there?

A. Figure of 32½ cents (N) for north bracketed with a figure of 35 cents (S) for south.

Q. That's on northbound and southbound moves, respectively?

A. That stands for northbound and southbound, respectively, and for the parenthetical notation, All States, which means that that was an individual tender of All State effective on that date.

Q. Now, I think——

A. (Interposing) It might be well to clarify, counsel, that the rates are not brought forward vertically. In other words, going to the last line, March 26, 1956, on page 1 of part 2, the fact that the 32 and one-half cents and 35 cent [fol. 908] rates are not brought forward to the last line, does not indicate that those rates were no longer effective.

Only the significant changes as they took place have been shown. So as of March 26, 1956, which by the way is a few days hence, the rates are still being cut. The last figure or set of figures in any one of the columns is the one that would apply as of today.

Q. Mr. Loretz, I call your attention to the second page of part 1, the next to the last column opposite the date 10/1/55, where we shown "40 (30N) service line, Inc.," and ask you to compare that rate with the rate which you have supplied applicable on the north and south bound movements tendered by Allstate, the 32½ northbound and 35 cent southbound.

I will ask you whether or not the same minimum applied on those two rates.

That perhaps wasn't clear.

A. I have your question. I have to look it up. Just one second, sir.

I should have inserted also on the one that I did insert in pen and ink 40,000 or 40M for those All State rates as effective 8/1/54.

Mr. Phelps: I would ask Your Honors that we might amend the proffered Exhibit J for identification in the manner indicated by the witness, if that may be done on the face of it by adding the figure which the witness has de-
[fol. 909] scribed.

Judge Lemmon: That will be satisfactory.

Judge Carter: I thought you were referring to the date of 10/1/55. You started there, at least. Did you switch back to the other page?

Judge Hamlin: Yes, he switched back.

Judge Carter: You asked a question about 10/1/55.

Mr. Phelps: Let me go back just a minute, Your Honors. I think perhaps we can clarify it.

Q. Mr. Loretz, looking at page 1 of part 1, am I correct in saying that the figure which you have added should be opposite the date 8/1/54?

A. Yes, sir.

Q. Those figures being 32½ cents for the northbound move, 35 cents for the southbound move, and the figure 40M should show, should it not?

A. Right.

Q. And shown as supplied by All State?

A. Right. I would like it to be clear, too, Mr. Counsel, that we have here—I think this will be illustrative of the similar situations on the following parts of the exhibit.

Here you have lower rates, 32½ cents and 35 cents, which became effective initially August 25, 1954, and they are, to the best of my knowledge, still in effect.

[fol. 910] So it should not be understood that those rates are superseded or cancelled by other rates which appear for the account of that carrier or other carriers later on under that column.

Q. So that the rate—now I think we have got it, Mr. Loretz—the rate that appears on page 2 of part 1 opposite the dates 2/28 and 3/5/55 in the next to the last column, you have shown there a rate "40 (30M) All State."

Now, I think you have indicated, Mr. Loretz, that that

does not mean that All State has raised its rate to 40 cents from the 32½ cents and the 35 cent rate you have described, is that right?

A. That is what I intended to convey. The later rate is on a lower minimum and presumably would operate with the lower rate on the higher minimum, and may be subject to certain special conditions which it was not practicable to include in a study like this solely for the purpose of showing trends.

[fol. 911] Q. Is there any other comment, Mr. Loretz, that you wish to make with respect to part I in order to make it completely intelligible?

A. No, sir.

Q. Will you turn to part II?

A. Part II is also a study of freight all-kinds rates, this being between the San Francisco-Oakland area and San Diego, and will show different rates, of course, but a comparable overall story, in that the rates on May 15th, 1952 were 67 cents, or the same as the California Commission minimum fifth class, and with various and many changes over the approximate four year period they end up by being a low, I believe, of 50 cents via one carrier, 55 via another, and so forth, as shown, as compared with a California Commission minimum fifth class of 80 and a half cents plus a 5 per cent surcharge, which is currently in effect.

Q. Will you turn to part III?

A. Part III is on the face of the study directed to the commodity ammunition and explosives, on which the points Port Chicago and Seal Beach, which were known points of movement in military traffic of that commodity, on which there was known traffic, and that follows the same pattern as the previously described parts of the exhibit, except that there are no California Commission minimums shown there. The California Commission does not prescribe rates [fol. 912] as such on ammunition and explosives.

Judge Lemmon: Do not these pages speak for themselves? Do they need any explanation of the witness?

Mr. Phelps: Perhaps not, Your Honor. I will be glad to have the witness move along.

Q. Mr. Loretz, do you think the rest of your exhibit is self-explanatory in the light of the explanation you have already made?

A. I believe it is, sir. I would like to point out that on part IV, the next sheet, it was necessary to make a correction of a typographical error, and you may wish to make reference to that physical correction on the record.

Mr. Phelps: It has been suggested, Your Honors, it would be a good idea if we number all of these pages. I think the reason is they were done rather hurriedly and we did not have time to number them, is that right, Mr. Loretz?

The Witness: That is right.

Mr. Phelps: May we ask that page numbers be given to the exhibit which we have identified, Your Honor?

Judge Lemmon: We will take the recess and you can do that during the recess.

(Recess.)

Mr. Phelps: I should like to offer in evidence the document now identified as Exhibit J.

Judge Lemmon: It will be received.

[fol. 913] (The document referred to was thereupon received in evidence and marked Defendant's Exhibit J.)

By Mr. Phelps:

Q. Mr. Loretz, are you familiar with the commodity rates prescribed by minimum rate tariff No. 2 between Los Angeles and San Francisco?

A. You are speaking, I presume, of specific commodity rates on specific commodities?

Q. Yes.

A. I know there are some, yes.

Q. You are familiar, I take it, with the FAK rates contained in these special rate quotations for traffic between Los Angeles and San Francisco?

A. Yes, sir.

Q. Were you present when Colonel Flanagan of the United States Army testified that the United States is now paying about 14 per cent more on their FAK rates

than would follow from the application of the commodity rates?

Mr. McConnell: I object on the phrasing of the question. If I recall Colonel Flanagan's testimony, he stated that a study by the I.C.C. had revealed that on a nationwide basis the United States paid 14 per cent more. I think if you will listen to the question you will note it does not quite reflect that testimony.

Mr. Phelps: I will withdraw the question.

[fol. 914] Q. What in your opinion, Mr. Loretz, is the comparison between the FAK rates applicable between Los Angeles and San Francisco and the commodity rates between those two points?

A. The FAK rates in the present depressed level are lower than practically all the specific commodity rates on named commodities.

Q. Can you give us some examples, Mr. Loretz, of some commodity rates between those two points that are higher than the FAK rates?

A. I do not have a copy of the California Commission's minimum tariff No. 2 with me, but I see that there has been reflected in our government quotation for application between Miraloma and San Francisco, for example, a 33 cent rate on canned goods, which is a rail competitive rate. I believe that same rate applies between Los Angeles and San Francisco. Canned goods, along with iron and steel articles, possibly one or two other specific commodities, are about the lowest rated rail carload rates that there are, with the motor carriers having permissive authority to meet those rates.

Of course, the present 31 and 32½ cent FAK rents between Los Angeles and San Francisco are even lower than this 33 cent rate on 50,000 pound minimum on canned goods.

I think I should add to my answer to that question, too, counsel, that there is one phase of the FAK rate deal that [fol. 915] has not been explained. As I say, it applies on everything from canned goods to steel bars to bulky and valuable commodities, but when you have in effect both specific commodity rates, as for example on iron and steel,

and also the freight all-kinds rates, in such cases where the specific commodity rates on canned goods or iron and steel, for example, are lower than the freight all-kinds rates—and there are a few cases where they are—the Government, of course, is accorded the advantage of that lower specific commodity rate.

So the practical application of the freight all-kinds rate is that it is not of such extreme importance to the Government on the normally low rated commodities like iron, steel, or canned goods, but they do use it, they do take advantage of it, as I would were I in their position, on the bulky and valuable commodities. So it becomes a freight all-kinds rate, you might say, in name only.

Its actual application is to depress the rate on normally high rated articles while the normally low rated articles which theoretically fall within that freight all-kinds description are separately taken care of by specific rates. So it does not become a give-and-take proposition. It becomes strictly a take proposition.

Q. Mr. Loretz, do you have before you a single page document entitled, "California Public Utilities Commission, [fol. 916] general rate adjustments in minimum rate tariff No. 2 (general commodities statewide) subsequent to May 15th, 1952"?

A. Yes, sir.

Q. Was that prepared by you or under your direction?

A. Yes, sir.

Mr. Phelps: May that be identified as the defendant's next exhibit, Your Honors?

[fol. 917] The Clerk: Exhibit K for identification.

(Whereupon Commission document referred to above was marked Defendant's Exhibit K for identification.)

By Mr. Phelps:

Q. Will you tell us just briefly, Mr. Loretz, just what that exhibit shows?

A. Just merely recites the decisions, the authorizations of the California Public Utilities Commission over the period shown, with the effective dates of increases in rates

which have been authorized by the Commission following investigations and hearings authorizing general increases in rates over the period of time.

Actually those are the same adjustments that have been converted into typical rates in the several studies comprising Exhibit J. The only further explanation, I believe, needed is that I have included there for information only certain decisions of the Commission which actually authorized adjustments in the rail rates, and the reason for showing that is that under our California statutes and the Commission minimum rate order the rail rates alternate with the motor carrier minimum rates for the rail rates inevitably control a certain part of the California minimum rate structure.

Q. Alternate—you mean a motor carrier is at liberty to charge the rail rate?

A. Right, for the same transportation under the same [fol. 918] conditions.

Mr. Phelps: I offer Exhibit K in evidence.

Judge Lemmon: May be received.

The Clerk: Defendant's Exhibit K in evidence.

(Whereupon Defendant's Exhibit K formerly marked for identification was received in evidence.)

By Mr. Phelps:

Q. Mr. Loretz, since 1952 has there been a diminishing number of motor carriers in California participating in government business?

A. That would be my observation, yes, sir.

Q. Do you know the reason for that?

A. I know the reasons as they have been given to me.

Q. Will you tell us what they are?

A. Certain of the carriers have dropped out of participation in the government quotations and of participation in government traffic because of the depressed level of the rate and have indicated they preferred to sort of stay on the sidelines until that freight would pay its way.

Certain other carriers have not retired, so to speak, from participation in government traffic, because they are large operators and possibly look a little farther ahead and

want to maintain their government contracts so that when times are better, meaning when rates are better, they will still be in the picture.

Mr. Phelps: You may cross-examine.

[fol. 919] Mr. McConnell: May it please the Court, we certainly do not want to violate any propriety, but may we divide the cross-examination, or is it prohibited under your rules, should it be conducted by the same person?

Judge Lemmon: If there is no objection to that it is all right.

(Colloquy between members of the Court; inaudible to the reporter.)

Judge Lemmon: Are you doing this just on a limited basis?

Mr. McConnell: Very limited, if you desire; I wish to ask some general questions and Mr. Broz more specific questions.

Judge Lemmon: Does this apply to just this one witness?

Mr. McConnell: If the Court pleases, that is an irregular practice, and I will just——

Judge Lemmon: I thought probably you were making the general cross-examination, and under some specific phase of the cross-examination your associate would take up.

Mr. McConnell: That was the general idea.

Judge Lemmon: It will be allowable applicable to this one witness.

Cross examination.

By Mr. McConnell:

Q. Mr. Loretz, as a matter of general information, which I know you have, approximately how many carriers in [fol. 920] California participate in government business?

Judge Carter: Talking about motor?

Mr. McConnell: Motor carriers.

A. I would estimate about 75 or 80 have rates on file with the military and are—would be to that extent eligible to participate, but just how many actually do as of today,

I wouldn't know. The figure of 75 or 80 is just those that, my estimated total of the participants in the four quotations, plus a known five or six others who have independent quotations on file.

Q. About how many—from your experience, about how many carriers in California are qualified legally to carry property for the Government?

A. When you say "qualified" do you mean under DOD regulations or just——

Q. Just under the certificates of convenience and necessity and other types of certificates.

A. Oh, there would be many, many hundreds of them that would be eligible either under certificate or permit of the California Commission, would be eligible to participate if they also had passed the test of DOD.

Q. About how many carriers, both certificated and permitted under the various types of carriers that they have in California are there in California?

A. I don't have that figure, sir. I think perhaps the [fol. 921] Commission witness to follow would have that better than I would. I would like to qualify my prior answer, too; in addition to those carriers that I named to participate in government quotations, some of whom are certificated carriers and some of whom are permitted carriers, all of the certificated carriers have tariffs on file, are, of course, eligible to, and do to some extent to a lesser or greater degree participate in government traffic, but not through the medium of reduced rates, they just do so under tariff rates.

Q. Mr. Loretz, what are some of the most important companies that you know that use your service that do participate in government traffic?

A. The participants through power of attorney to me in the joint Nickerson-Loretz quotation are the following: C&L Freight Lines, Inc.; Columbia Van Lines, Inc.; Constructors Transport Co.; Charles P. Hart Transportation Co., Inc.; A. R. Pearson Truck Co.; San Diego Forwarding Co.; Savage Transportation Co., Inc.; Wells-Fargo, Inc.—which parenthetically Wells-Fargo is a Reno, Nevada company, but having permits to operate within California; Western Truck Lines, Lt-.

Q. Do you follow the operations of these companies rather closely?

A. Not their operations, sir; my main contact would be [fol. 922] with their traffic managers or traffic personnel and to some extent with the officials of the company.

Q. How large a company is, say, Constructors Transport Company?

A. Well, in terms of number of vehicles or number of employees, I couldn't tell you. I regard them as a fairly substantial carrier within the field of government traffic. They have been, as distinguished, I think, from the others that I mentioned there, they have more or less specialized in government traffic.

Q. When was that company organized, do you know, approximately?

A. Oh, approximately ten years ago, I would say, roughly.

Q. You're fairly familiar with its history?

A. No, only through my own contacts with the officials of the company.

Q. Has its growth been a slow, steady one through your general observation?

A. I would say its—sort of had its ups and downs.

Q. Is it much larger now than it was when it started?

A. Well, of course, if it started from zero, any growth would be a large one expressed in terms of percentage, but I would say it is probably larger today than it was as of its initial start, yes, sir.

Q. That company is still carrying government traffic, I [fol. 923] take it?

A. Yes, sir, I understand it is.

Q. About what percentage of its business is government traffic?

A. I wouldn't know, but I'd say a much greater percentage than, probably than any of the other carriers whom I mentioned a few moments ago.

Q. Just one other question, since we have adopted this mode of procedure. You expressed admiration for Commissioner Fries, we all have admiration for him. I noticed in your chart that there was a steady rise in the minimum rates of the Commission, has been since 1952 or 1953, is that correct?

A. Yes, sir.

Q. I read here from a speech by Commissioner Fries entitled "The Deep Freeze". This speech appeared in a Traffic World, I believe in California.

(Colloquy between counsel inaudible to the reporter.)

Mr. McConnell: The Interstate Commerce Commission practitioners in New York, and ask you if you agree with this:

"Gentlemen:

"I start on the premise that under today's highly competitive situation the power to prescribe minimum [fol. 924] rates is indispensable. Without it regulation would be futile. Yet, the too free exercise of this power is highly undesirable. To me it is something like a bald head—a thing that a man doesn't want, and yet if he has it he wouldn't be without it. This is but to say that we would not be without the power to fix minimum rates, but we should, nevertheless, be circumspect about its use.

"Since 1935 I have had a lot of experience along this line—until two years ago all on the state level. In accordance with the California statute we established minimum rates on a scale probably unequalled anywhere else. We even published the tariffs containing them. As costs went up we increased them. There was provision for special treatment to meet particular situations but generally the trend was to an ever higher level. When minimum rates were established the affected carriers were directed 'to cease and desist and thereafter to abstain from applying' any that were lower. In large measure this eliminated rate cutting, but it may be questioned whether, everything considered, it was worth the price. Certainly the resulting rate [fol. 925] structure was higher than it would have been under free competition. Carriers were protected against reductions below the prescribed minima, but they also found it impracticable to charge more. That, of course, was not true during the emergency when there was such a tremendous shortage of equipment;

people were willing to pay most anything in order to get their traffic moving. I am talking now about normal times and normal conditions.

"Shippers resisted paying more than the rates that had been prescribed, and since above the minimum level competition was unrestrained, it was easy for shippers to enforce their demands."

You agree generally with that, this speech, "The Deep Freeze?"

A. I can't answer that categorically yes or no, counsel. It covers several different things, as I am sure you and the Court realize.

I could make one or two comments on it, if I may. Number 1, that the prescription of minimum rates within the state of California under the California statute is, of course, something different than the use of the minimum rate setting powers of the Interstate Commerce Commission where they are only invoked under most unusual circumstances, whereas here in California where it is the [fol. 926] duty of the Commission to set minimum rates for all.

My second thought was that departures—I agree to this extent with the Commissioner whom I greatly admire, and that is the minimum rate powers of the Interstate Commerce Commission should be used only in most exceptional circumstances, because they do, under the Interstate Commerce Act, tend to hamstring and impede those that may be subjected to them in many cases.

Here in California we would be helpless on commercial traffic, as we are presently on government traffic, without the minimum rate setting powers of the Commission.

I have never witnesses any depression of rates or rate cutting in the face of rising costs such as has prevailed on this government traffic. It even goes beyond what happened on commercial traffic prior to the enactment back in the early days, in the thirties, of the present California Code which gave the Commission power to set minimum rates on commercial traffic.

Mr. McConnell: Thank you for the indulgence of the Court.

Cross examination.

By Mr. Broz:

Q. Mr. Loretz, you stated on your direct examination that you have personal knowledge of the development of special rate quotations for the Government since May 1952, is that correct?

[fol. 927] A. Right.

Q. You know, of course, that special government quotations were in effect during the period—during Korea and prior to Korea and during World War II, are you not?

A. I am aware that there were quotations, yes.

Q. Are you aware also of the meeting that was held in California at the request of the California carriers, and on a cooperative basis, between the Department of Defense with those California motor carriers some time in 1952 which led to the establishment of the freight all-kinds rule which resulted in the 20,000 pounds at fourth class, 30,000 pounds at class A, and 40,000 pounds at fifth class?

A. I am.

Q. That meeting was one of mutual cooperation between the motor carriers and the Government with a view of stabilizing rates on freight all-kinds in California, is that correct?

A. That was the stated purpose, but unfortunately that wasn't the final result.

Q. Well, coming out of that meeting rates were established on that basis for a time, were they not?

A. They were.

Q. And they did lead to a certain amount of stabilization on government traffic moving during the Korean conflict?

A. When did the Korean conflict terminate? I——

Q. I believe it was in late '52; it started in June 1950.

[fol. 928] A. My study shows that the rate cutting in a big way started in the first part, the middle of 1954.

Q. You were acquainted with the establishment of minimum rates in California going back to 1935, were you not?

A. Yes, sir.

Q. You remember the rather herculean study undertaken by the California Commission to analyze the economic

commodities of California and their transportation with a view of stablizing minimum rates at that time, are you not?

A. Yes, sir.

Q. They took into account the movement of agricultural and manufactured products and everything moving in the state at that time, did they not?

A. I believe they did.

Q. They classified that traffic and tried to determine its transportation characteristics and the nature of the commodities that were moving and the patterns of movement, did they not?

A. They did that among other things.

Q. Do you recall a single military commodity moving in 1935 that was included in that study at that time?

A. I don't recall whether or not, I am not familiar with the military movements, if any, at that time.

Q. Would you agree that the military establishments in California and their operation in 1935 were hardly anything [fol. 929] like they were in later years?

A. Certainly.

Q. And to the extent, therefore, that the California Commission's minimum rate decisions culminated in a minimum rate structure for this state, which excluded military traffic that may have been moving in the period when the study was made, to that extent that minimum class structure is deficient, is it not?

A. No, sir, I can't concede that.

Q. Can we leave out a part and still have the whole?

A. Let me have the parts, if you please.

Q. Now, about your agencies, the Bureau agencies, the four tariff publishing agents that you mentioned. Nearly all of the carriers who are engaged in regular transportation of government traffic are members of those four bureaus, are they?

A. The majority that participate in a large way in government traffic I would say are. As I explained in answer to a previous question there are many certificated carriers who handle government traffic under their tariffs which are not a party to any of the government quotations.

[fol. 930] Q. Yes. And these matters are given considera-

tion by groups on the question of publishing a government rate but independent action is permitted, is it not?

A. That is correct, so far as the participant in the quotations are concerned.

Q. Isn't it generally true that in most tariff publishing bureaus independent action is one of the basic rules of membership?

A. It certainly is in any that I am associated with. It has to be.

Q. Referring now to the statement which you made about Commissioner Freas on rate-making, did he not also say that minimum rates have a tendency of becoming the going rates?

A. I don't recall his having said so, but that has certainly been the case in California.

Q. And you would subscribe to that theory of rates strictly as being actually the case? Minimum rates do tend to become the going rates?

A. I think we have to be specific there. I know of many situations outside of the State where that might not be true. Assuming that you are discussing the situation in California, the minimum rates have largely been the going rates.

Q. Permitted carriers are allowed to alternate the minimum rates with the rates published in the common carrier motor tariff-rail and motor tariffs, I believe you stated.

[fol. 931] A. That is right.

Q. And as a practical rule, they therefore turn to such tariffs as Pacific States South Quotation Rate No. 255 for comparison purposes, do they not?

A. That is one tariff that they do, yes.

Q. And they also use that same South Coast Tariff No. 300 for commodity rates, is that true?

A. I recognize those tariffs. Of course, there are many others.

Q. Now, Mr. Loretz, in your long experience in rate making, is it not true that the rates published in those tariffs applying on a commodity rate basis are generally between metropolitan civilian population consuming areas?

A. I will say that that may be a correct statement in that

the bulk of movement is largely between large metropolitan areas.

However, we have out here in the West, and this includes California, as I am sure you know, a sort of a tailor-made rate structure. If we have a steel mill up in Geneva, Utah and they have a steel mill at Fontana, California, why, even though they may not be metropolitan areas, the carriers cooperate in the making of rates from those points which are somewhat remote in themselves, to the metropolitan areas and to project sites.

Q. You were referring to the canned goods rate of 32 [fol. 932] cents from Mira Loma to San Francisco, or did I understand you to say from San Francisco to Mira Loma? In comparison with the 31 or 32 cents freight all-kinds rate between the same points.

You mentioned that rate, I believe, on canned goods as a competitive rail rate.

A. Yes, that appears to apply between them, and I believe it also goes to commercial traffic.

Q. You know, as a fact, do you not, Mr. Loretz, that that 33 cent rate is an evolution of a 25 cent rail rate on 80,000 pounds made by the railroads to meet motor competition?

A. I don't know which came first. I know that each one of them claims they are meeting the other.

Q. No; but is it not a fact that the railroads published 25 cents on 80,000 pounds for the purpose of recovering the canned goods traffic between the Bay Area of San Francisco and Southern California?

A. I don't believe that's a correct statement, Mr. Broz.

Q. Correct me, then, and tell us what the fact is.

A. Well, I have never had occasion to specifically appear in any cases involving canned good rates, but it is my best recollection that some few years ago, very few years ago, that the railroads did publish a 25 cent rate on canned goods and on iron and steel, and I believe certain other commodities, which were at the time lower than any [fol. 933] motor carrier rates. And I think the motor carrier rates fought those rail rates to suspension proceedings.

That is my best recollection. But I am pretty sure the rails were the ones that started it.

Q. But the rate did become effective despite the suspension?

A. Yes, sir.

Q. And it did become effective on an 80,000 pound minimum?

A. I will accept your word on that. I am not sure.

Q. Would you agree with mr, Mr. Loretz that there is no canned goods movement between Mira Loma and San Francisco by rail or motor?

A. I am sure there was at one time, Mr. Broz. I don't know what the military schedule of shipping, how it may have been changed recently.

Q. Well, I can assure you there are no canned goods at the Mira Loma Air Force Depot, and I don't know of any industry within miles of that that ships canned goods. Would you therefore say that that is a paper rate?

A. If, as you say, there is no longer any movement between the points involved, why, the existence of that rate in the absence of a movement would make it what we term a paper rate.

Q. You mentioned in your quotation as having in one of the front sections of the tariff rates prescribed by the [fol. 934] Commission which are the class rates of the Commission, and they are published in your tariff on the same basis as they are in the PUC tariff No. 2. That is done as a matter of convenience more than anything else, is it not?

A. Yes. It is the Commission's class distance scale converted to a point to point basis.

Q. But it is done as a matter of convenience to the shipper and to the government people who have to use the tariffs for ratings to quickly determine what the rate is between two points?

A. As a convenience to all concerned.

Q. And it is a fact, too, that the military do pay that class rate on less than carload and less than truckload traffic to a certain extent?

A. To a certain extent, I am sure they do.

Q. Are you acquainted with the physical location of military activities in California in relation to the metropolitan centers of population? Are they right in the centers of population or are they somewhat outside of town?

A. Both.

Q. Well, let us take the Air Force. Are you acquainted with the fact that Beale Air Force Base is eleven miles southeast of Marysville; and that Castle Air Force Base is seven miles northwest of Merced; and that George Air Force Base is six miles northwest of Victorville? If you [fol. 935] will accept my statement that those are the true distances——

A. I will.

Q. —isn't it generally true that the Commission's PUC rates apply from the point within an incorporated city to another point within an incorporated city; isn't that correct?

A. No, sir, I don't believe that would be the case. You are speaking of class rates, are you?

Q. Speaking of class rates or commodity rates on a point to point basis.

A. In the application of those class rates for traffic or movement between Castle Air Force Base and George Air Force Base, that would be subject to the governing distance and constructive miles as set up by the Commissioner. Or it might happen that George Air Force Base might fall in the same mileage bracket as Victorville or it might not.

Q. The point I am trying to make, Mr. Loretz, so that you may understand the reason for my question, the commodity rates published in the common carrier tariffs today apply on commodities that generally move between commercial centers of population for civilian consumption; isn't that true?

The Witness: Mr. Reporter, may I have that question repeated, please?

(Question read.)

By the Witness:

A. In common carrier tariffs you are talking about [fol. 936] now?

By Mr. Broz:

Q. Yes.

A. I think it would be generally true, but not entirely true. Commodity rates, I think we should explain to the Court, are those rates that are established as departures from class rates on the showing by anyone, whether it be the military or a commercial shipper, that there is an unusual or heavy movement between the points involved, whether that be a metropolitan area at either one end or both, or some relatively obscure point.

As I stated a few moments ago, the commodity rate structure out here, including California, is very much tailor-made, and the common carrier rate structure as it is today reflects the various negotiations that have been satisfactorily entered into by the carriers and the shippers, both military and commercial, and subject in some cases to Commission review or prescription.

Q. I don't think you have answered my question. I asked a simple question, isn't the rate from Point A to Point B specifically applicable only between those two points? You can answer that yes or no.

A. Well, the tariffs speak for themselves. If there is a rate from Los Angeles to Victorville, that rate obviously applies from Los Angeles to Victorville.

Q. Let's move that one more point and say Merced, Cali- [fol. 937] fornia to Victorville. That rate applies only between Merced and Victorville, does it not?

A. It would apply between Merced and Victorville and intermediate points.

Q. True.

A. And——

Q. (Interposing) Would you say that that rate applies between Castle Air Force Base and George Air Force Base, if so named?

A. I would have to study the particular tariff involved to find out if the Air Force Base was intermediate or within the same rate bracket. It might or it might not.

Q. If you take my word for it that Castle Air Force Base is seven miles outside of town, the town of Merced, and that George Air Force Base is six miles outside of Victorville, could the Merced to Victorville canned goods rate possibly apply on a shipment from Castle Air Force Base to George Air Force Base?

A. I don't want to evade your question, Mr. Broz, but it would depend on whether the point that is six miles outside is intermediate to or beyond the point in question.

Q. Well, both points could not be intermediate, or they might be intermediate. But let us assume that they are not intermediate. Let us assume that the origin is not intermediate and the destination is not intermediate. In that [fol. 938] case would it apply?

A. If it is a fact that neither of the points is intermediate, the point to point rate would not apply. But, as Colonel Flanagan brought out very ably in his testimony this morning, if there is an existence of a Merced to Victorville rate and there is a substantial movement between Castle Air Force Base and George Air Force Base, that in itself would warrant the negotiation with the carirers for an extension of the rate. And the means exist for such a negotiation. I don't see that you have any insurmountable problem there.

Q. But the problem is to establish a commodity rate from Castle to George, isn't that the problem?

A. There would be certain mechanics of publication to go through, the same as there was for the original Merced to Victorville.

Q. Now, assuming that you have a regular movement between these two points, Merced and Victorville; and we will assume that Merced makes canned goods and Victorville consumes them; do you think that in itself would justify the government to ask for a commodity rate from Castle Air Force Base to George Air Force Base if it didn't have a commodity moving of the same transportation characteristics, of the same volume, and that would return to the carrier approximately the same revenue?

[fol. 939] A. If it did not have that commodity or a commodity of like transportation characteristics, why, probably that particular rate could not be used as a precedent, if I follow your thought.

[fol. 940] Q. What are the differences based upon your knowledge of the transportation characteristics of military and commercial traffic in California today?

A. I will have to ask that that be repeated.

(Question read.)

A. I can't give you a categorical answer to that. Some military traffic consists of the same things and is comparable to commercial traffic. In addition, the military obviously moves certain things between certain points where there is no commercial movement.

Q. Taking them up commodity-wise, we will admit that there are certain commodities such as clothing that are common to civilian use, and therefore had the same transportation characteristics, but is it not true that there are many items in the military stock list catalogue that have no civilian counterpart?

A. Yes, just what percentage I do not know, but there would undoubtedly be some.

Q. Would you say they would be numerous, as to commodity descriptions? I am referring to airplane parts, ammunition, armed vehicles and things of that kind.

A. Well, if you want an answer directed to the weight of those commodities as compared with weight of the others, I would say the answer would be no. If you were asking me if there are a number of articles in the military catalogues [fol. 941] that have no counterpart in civilian activities I would say yes. To what extent those move in California I do not know.

Q. Do you find that the so-called exclusive use rule is common in commercial traffic, as common as it is in military traffic?

A. It is common in tariffs for commercial use, but I think the military—it can be safely said that the military would use that more often than commercial shippers.

Q. Would you explain to the Court what exclusive use rule is in the military on truck traffic?

A. Yes, sir. The military occasionally have shipments of classified material or they have a movement of unclassified material which must be expedited, where they call upon the carrier to furnish a vehicle for them, and in effect agree to pay the carrier for the use of that vehicle, regardless of what weight that would be loaded in the vehicle. Is that sufficiently detailed for you?

Q. Yes. That would be the first class rate of 10,000 pounds as a rule; is it not?

A. That is the present exclusive use rule, 10,000 pound minimum scale, first class rate which, of course, as you know in California is a depressed bracket.

Q. And that is a penalty which very seldom happens in commercial traffic, isn't that true?

[fol. 942] A. I can't call it *is* penalty. It is a rule which is put in there for military use.

Q. Turn now to your Exhibit J for identification for a moment. I note in there that some of these rates are published marked "N" for northbound only and in some cases "S" for southbound only. I think that you are acquainted with the word "load factor". Would you explain to the Court briefly what load factor means in the trucking business in California today?

A. Well, if a carrier can load its vehicle, assuming between Los Angeles and San Francisco, to its capacity in both directions, it has a 100 per cent load "F". But if it has a full load in one direction and must go back to its home base empty, it has a 50 per cent overall load factor, and I am glad you brought that up, Mr. Broz, because these north and southbound rates do have a significance right in that connection.

We have in California probably approximately an equal number of motor carriers that have their home base in the San Francisco area with those that have their home base in the Los Angeles area. Naturally they originate the greater part of their business around their own home town. So what is backhauled to one half the carriers is forward movement to the other half. The unfortunate net result is that each one is looking for a backhaul and is willing to give [fol. 943] depressed rates or gas money, as they sometimes term it, to get his vehicle back home—anything he can pick up on the return load is better than nothing, his back load being the other fellow's forward movement.

That is probably one of the biggest contributing factors to depressing rates when there is no regulatory body to step in and try to do the thing that is best for the overall good.

Q. Before I get into a comparison of two of these carriers, is it your experience that approximately 90 per cent of the quotations furnished to the United States Government on California traffic are so-called voluntary quotations by

the carrier and that only about 10 per cent or even less are negotiated?

A. I would say even a greater percentage than 90 per cent are unsolicited or non-negotiated. In other words, they have not been requested by the Government. It is just strictly for rate-cutting purposes. But we must remember there the statutory right, as I understand it, of the Department of Defense to use that cut rate, whether they have asked for it or not, so whether it has passed the test that Colonel Flanagan described of reasonableness, it is their statutory obligation, so they tell me, to use that rate, even though they may know it is depressed.

Q. So far as the transportation companies themselves are [fol. 944] concerned, it rests within the managerial discretion of a trucking concern whether they reduce the rate or not; they do not have to reduce it, but they do so and do so voluntarily in most cases, do they not?

A. These non-solicited rates which are generally reflected in Exhibit J are the results of so-called managerial discretion in cutting the other fellow's rates.

Q. Will you turn to part I of your Exhibit J for identification, and the second page of that under the date of January 25th, 1956.

Mr. Phelps: Excuse me, Mr. Broz. I have asked that the pages of this exhibit be numbered.

Judge Lemmon: Page 4 it is numbered.

By Mr. Broz:

Q. You will notice in the Loretz column, headed Loretz, a 32½ cent rate northbound, 40,000, CTC, which is Constructors, and a 35 cent rate southbound, with the same minimum by the same company.

Skip over to the column headed "AHL". You will note the northbound rate is 35 cents via the CCTL, which is Coast Counties Truck Line, and the southbound rate is 30 cents, 40,000, by the same company.

Do you notice the fact that one carrier has a higher northbound rate than southbound; the other carrier has a higher southbound rate than northbound. Now, the Constructors Transport Company headquarters are in Southern Cali- [fol. 945] fornia, are they not?

A. They are.

Q. And the Coast Counties Truck Line, where are their headquarters?

A. San Leandro, I believe.

Q. In other words, the Bay Area of San Francisco?

A. Yes, sir.

Q. So that each of these carriers then publish a lower rate on their outbound movement from their headquarters area and a higher rate for the return movement, isn't that true?

A. They both have offices in both the north and south area. In fact, that is reflected in the quotations which have already been identified here. Coast Counties Truck Line, in addition to their San Leandro Office, which I assume is their headquarters, also shows as having offices in Glendale, which is a suburb of Los Angeles, and in Los Angeles proper. Constructors Transport, in addition to having what I believe is their main office at Montebello near Los Angeles, have an office at Oakland, which I understand is just as effective in producing business as the southern one. I can't say as to the relative value of traffic north and south of either one.

Q. It just so happens in this particular case, doesn't it, that the carrier in addition to reducing its rate to what would normally be a return haul load to improve its load [fol. 946] factor, actually has a higher rate to the Government for what would normally be a return home load?

A. It would so appear, Mr. Broz, but I would point out that as to one of those carriers I am familiar with, Constructors Transport, what he was doing was beating competition as he found it, as reflected with that All-State rate effective originally August 15th, 1954, which I had inserted here today.

Q. Let us take another subject here. Freight all-kinds rates, which you state were objectionable in name, generally speaking, because rates are not applicable on a proper level to each of the component commodities in the group, seem to be criticized by you as something unusual in California. Isn't it true that we have freight all-kinds rates on transcontinental rail traffic throughout the entire country, and they are not unusual at all?

A. We have them on transcontinental rail traffic, and I am well aware of that because I happen to have fought the institution of those rates many years ago, and the railroads were able to justify those particular rates first because they were on an extremely high level. They were what the railroads termed overhead rates, higher than any of the specific commodity rates on normal moving traffic, or sort of catch-all rates, as the railroads termed them, for use by the high grade freight forwards. And further, if I may [fol. 947] complete my answer, they were further able to justify them because of the minimum weight, minimum carload weight that they made a part of that rate.

So, coupled between the high rate and the high per car revenue produced, they were able to show the Interstate Commerce Commission that they were getting more revenue out of those freight all-kinds rates than they were out of the specific commodity rates between the same points at lower rates.

Q. But the reason the rates were established by the railroads in the first case was to meet truck competition, isn't that true?

A. No, sir.

Q. Are you sure?

A. That is not my recollection.

Q. Did the railroads westbound transcontinental have a lot of competition on mixed truckload rates of transcontinental lines at the time they established those freight all-kinds rates?

A. They probably did, Mr. Broz. What I termed logical mixtures—for example, various kinds of canned goods, drugs, or medicines or things which are normally grouped together in a tariff.

Mr. Broz: With the Court's permission I would like to show the witness some bills of lading that he testified to on freight all-kinds from Maywood to McClelland.

[fol. 948] Q. I would ask you, Mr. Loretz, if these mixtures there appear to be inadequate or out of line?

Mr. Phelps: May I ask you what you mean by inadequate or out of line, counsel?

Mr. Broz: The witness stated he thought steel, brass, billets, airplane parts and other things were not very mis-

able as freight all-kinds items, and what I am trying to elicit from the witness is an admission that those items are fairly homogeneous in the military classification.

[fol. 949] A. It might be for the military, Mr. Broz, but they are not in normally related commodities from a transportation rate-making standpoint. I don't know if the Court wants me to elaborate by reciting the items that are here or not.

Q. I don't believe it will be necessary to describe them in detail; they were described yesterday. But I would just ask you if Maywood stores these items. Is it unusual that —is it unusual to expect that they might ship them in a mixed truckload lot to McClellan?

A. I am sure it would be to the convenience of the military to do so.

Q. Now, on these movements it was testified yesterday that the rate was 40 cents on 30,000, making $120 a load, and moved by All State transportation. You were a traffic manager. If there were no quotations on freight all-kinds and it was necessary to classify these and use the Commission's PUC class rates, the charges on this first bill I have on top would have been $218.00. Do you think the government is taking an unfair advantage of California by paying a charge of $120 on a mixed truckload shipment of this kind?

A. I wouldn't want to answer that one way or the other. I think there is enough doubt created there that that's one of those matters that the Commission should determine whether that is a fair and adequate rate for such a mixed load.

Q. You stated that freight all-kinds rates have been [fol. 950] abused in California. Just what did you mean by that statement?

A. Well, probably one illustration would be if the government would contract to move all of its freight, which the term "freight all-kinds" would indicate at a rate of, we will say, 40 cents between Los Angeles and Sacramento, for illustration, and the carrier, subject to a minimum of 40,000 pounds of $160 a load, that would be one thing. But when the military ships its canned goods at 33 cents and its iron and steel at 33 cents and only takes the circuit breakers and the scientific instruments, such as are included in that

waybill you showed me a moment ago at the freight all-kinds rate, then I say that would constitute an abuse. At least that was the way I meant the term.

Q. You mean that it is an abuse to mix the higher classed items with the lower classed items and get a freight all-kinds rate, is that it?

A. I would say that if they shipped the good along with the bad at the freight all-kinds rate, that might be a mutually fair arrangement. I say might be. But when we all know that only the high class freight moves at the freight all-kinds and they pull out the heavy freight and take advantage of low rates on the other freight, it isn't a mutually good arrangement; it's good for the shipper only.

Q. You don't think it's good for the carrier?

A. In my opinion, it is not, but I think that's one of those [fol. 951] things the Commission should have a look at and determine.

Q. If the carrier voluntarily does it as a matter of his managerial discretion, you still think that it isn't proper?

A. I think it isn't proper, and I just back that up by reference to my Exhibit J as to what has happened to rates over a four year period where managerial discretion was the only form of policing.

Q. You think your exhibit indicates a normal readjustment of rates to a more reasonable level from what were unreasonably high levels? You think that is what your exhibit shows?

A. No, sir; if I correctly understand your question, it is my personal opinion that if we are going to have any freight all-kinds rate, which I don't subscribe, but if we are going to have them, that a basis of fifth class as the bottom, the floor, is as low as it should go. And in May 1952 and continuing on until '53, why, that Fifth class for freight all-kinds application was the floor. Now, they are down to 50 or 60 per cent of that.

Q. Would you say the present rates of truck lines in California on government traffic are uncompensatory to the carriers?

Put it another way: You think any carrier is hauling traffic for the government at uncompensatory rates?

[fol. 952] A. Yes.

Q. Would you cite some instances that you know of personally where that is the fact?

A. I think 31 cents and 32½ cents and 35 cents between Los Angeles and San Francisco areas is too low.

Q. Some of your own members publish a 35 cent rate.

A. They exercised managerial discretion and feel that they have to meet the competition as they find it and hope that they can get some better traffic, better paying traffic in the reverse direction to build up the round trip revenue. To what extent that theory may pay off, I don't know.

Q. That rate was put in 1954. I assume they are still in business.

A. You are speaking of Constructors Transport Company?

Q. No, this says special; spc. I don't know who it is.

A. Well, Constructors Transport Company is still in business. Of the 15 carriers that participated in my particular quotation in 1953 or '54, I think nine of them are still in the quotation; the rest have definitely retired from government traffic, at least under the quotation, and certain of the remaining nine are limiting their government traffic solicitation and handling.

Q. Now, one last series of questions. You wouldn't want to leave the impression with this Court that the predominant traffic in the State of California today is moving under [fol. 953] freight all-kinds rates, would you?

A. In so far as the military is concerned, and of course you are speaking of military?

Q. Yes.

A. I would say that a very substantial portion of it moves under freight all-kinds rates.

Q. Have you made any tonnage figures to determine how much moves under freight all-kinds as against how much moves under commodity rates?

A. I have not as between all-kinds rates and specific commodity rates, but if the commodity, if the one commodity, ammunition and explosives, is considered separately I would say that on the balance of the military traffic that a very substantial part of it moves under freight all-kinds rates.

Q. You would not want this Court to assume that your

exhibit marked J for identification is illustrative of the patterns of movement that covers the predominant traffic of California, would you, tonnagewise?

A. As I stated in presenting the exhibit, I consider these movements to be representative military movements. As to exactly what percentage of the total military traffic, as to what percentage moves under freight all-kinds rates, the government is in a peculiar position of being able to give that figure, and I am not.

Q. You are familiar with the location of many installa- [fol. 954] tions of a military nature in the State of California that are not described in your Exhibit J for identification?

A. Oh, yes, yes, I didn't attempt to treat with only but a representative few.

Q. And you are acquainted also with the fact that between those points and the many depots that serve those points there are a large number of commodity rates established by special quotation, specifically on the commodity and responsive to its transportation characteristics?

A. If I understand your question, there are a number of specific commodity rates between these points and between other points of military movement.

Q. You mentioned a jet engine, "that you publish yourself." Now, that's a specific commodity quotation, isn't it?

A. Yes.

Q. And that quotation was made with regard to the nature of the movement and the loading characteristics of the item and its ability to get the rate that you sought?

A. That was one of these tailor-made rates that I spoke of and which I think there should be more of, because they take into account the transportation characteristics and other things that should be taken into account in the making of a compensatory, reasonable rate.

Q. But you say that the rates on that jet engine quota- [fol. 955] tion are fairly compensatory to the carrier who are parties to them?

A. It is my understanding that the carrier feels they are.

Q. Those jet engines don't move under freight all-kinds rates?

A. Not so far as that quotation is concerned.

Q. Are you familiar, Mr. Loretz, with the matter of filing applications before the Public Utilities Commission as to the administrative procedure involved?

A. For relief under the minimum rate order?

Q. Yes, sir.

A. Yes, sir.

Q. In the normal event, if there is no contest or controversy, the Commission may treat that application in an ex parte manner, is that correct?

A. If there is no possibility of some party in interest being damaged to—would be denied his right of appearance and hearing.

Q. But if there is a controversy, the Commission will set the matter down for hearing?

A. Right.

Q. Would you say that the competition between the rail carriers and the motor carriers of this State is still as acute as it was in 1935 to the point where a number of military items might be contested before the Commission on [fol. 956] proceedings involving a motor carrier on one side and the rail carrier on the other side?

A. Well, there would be contest between the different forms of transportation competing for the same movement, but the Commission is in a position to, under its administrative procedure, to give expedited attention to such a matter.

Q. Well, this expedited attention involves what the Commission regards as due process, being notice of the hearing, which is usually about ten days?

A. Right.

Q. A hearing which may take a day or possibly two days?

A. Right.

Q. A disposition of the proceeding by an order that becomes effective 20 days after issue?

A. That would be normal. I think the Commission could depart under special rules from that in any type of an emergency.

Q. In a controversial case, some amount of notice of the effectiveness would be given, say, cutting it to ten days instead of twenty days for its effective date. That might happen?

A. That might happen or a shorter notice might happen. I don't know what the Commission might do.

Q. Then depending upon the attitude of the party who was not satisfied with it, a petition for reconsideration or [fol. 957] rehearing might be filed under the Commission's rules of practice, is that true?

A. That would be true under commercial competitive rules. Whether the Commission could set up special rules for the expedited handling of military traffic or military rate proposals is something I don't know, but I am sure it lays within their power to do so if good reason is shown for it.

Q. If we assume, then, that the Commission follows its rules of practice and this petition is filed, it stays the effective date of the Commission's order until such time as the petition is decided?

A. That's true on commercial traffic, yes, sir.

Q. Would you say that in controversial cases, therefore, where the normal channels of due process were followed, that it would be possible to get a decision out of the Public Utilities Commission in California in less than 30 days?

A. As to commercial traffic, I would say that 30 days is probably pretty conservative. As to what the Commission might do on military traffic, as you have stated, if there are unusual conditions there, I couldn't say. I am sure they will find the means of meeting that situation, though.

Q. But so far as you know now, no such rules have been promulgated or proposed?

A. There are none in effect on commercial traffic.

[fol. 958] Mr. Broz: Thank you very much.

Judge Lemmon: Any redirect?

Mr. Phelps: No further questions.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Lemmon: May we ask how many more witnesses you have?

Mr. Phelps: Two more, Your Honor.

Judge Lemmon: And does the government anticipate any rebuttal?

Mr. McConnell: At this present time we do not.

If the Court may please, as I understand it, there will be a witness from the Commission staff?

Mr. Phelps: Both of them will be from the Commission staff.

Mr. McConnell: There is one aspect of the matter that troubled me about our proof. You have mentioned, and you put in evidence the rest of these carriers. We were interested in the ones, Constructors, that seem to be in distress, or that is an allegation, and I take it that you have the financial records of these companies in the Commission, do you not?

Mr. Phelps: The certificated carriers who are under the Public Utilities Act are required to file with the Commission annual reports and they are public records, public to anyone, yes.

Mr. McConnell: I just thought if it is possible, if it [fol. 959] isn't too much of a task, I have a list of the carriers, if there could be some information in an elliptical way with respect to their financial history.

Mr. Phelps: Well, counsel, all I can say is that the records pertaining to such of these carriers as are public utilities are public records, available to anyone who wishes to examine it, I don't think it would be reasonable to expect us to, between now and tomorrow, examine those public records on your behalf and supply you with the data.

Mr. McConnell: I didn't know whether you are going into that aspect of it or not.

Mr. Phelps: No.

Mr. McConnell: You allege these men are in distress.

Mr. Phelps: No, no, I have no intention of doing that.

Judge Lemmon: Take the adjournment until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken to tomorrow, Friday, March 23, 1956, at 10:00 o-clock a. m.)

[fol. 960] Friday Morning Session, March 23, 1956, 10:00

The Clerk: United States of America v. Public Utilities Commission of California, for further trial.

Mr. Phelps: If Your Honor please, I believe I mentioned

yesterday that there were a number of documents presently contained in the appendix to the brief which the defendant filed on the motion to dismiss which we should like to have made a part of the record. I am not quite certain of the legal status of them now. I would like to be sure they become part of the record. If I may describe them sufficiently, I would like to do so.

Mr. McConnell: May it please the Court, may we put that under our motion to strike, too? We feel it might be collateral.

Judge Lemmon: It may be received subject to your motion to strike.

Mr. Phelps: Decision 51047 in case 5432.

Decision 51832 in case 5432.

Decision 51922 in case 5432.

Decision 52287 in case 5432.

Decision 52317 in case 5432.

The petition of the Department of Defense to postpone the effective date of decision of 51832 in case 5432.

[fol. 961] Judge Lemmon: Those are exhibits attached to some affidavit, are they?

Mr. Phelps: They are attached to the appendix to the memorandum of points and authorities we filed in support of our motion to dismiss.

Judge Carter: They start with page 6 and run through how many pages? The appendix pages are numbered in the memorandum.

Mr. Phelps: Yes. I think we found it impracticable to follow the paging.

Judge Carter: How are they to be marked in this matter? Do you just want to have them deemed read into the record?

Mr. Phelps: That would suit my purposes, Your Honor, or incorporated by reference.

Judge Carter: They are not being filed as exhibits?

Mr. Phelps: No.

Judge Carter: So you would either have them read into the record or made as an appendix to something, one of the two.

Judge Lemmon: Have you a copy of that brief by which you can offer these exhibits in evidence? There is nothing tangible here in the record.

Mr. Phelps: I can do that, Your Honor, yes. It might be feasible to physically separate these documents out of the memorandum of points and authorities.

[fol. 962] Judge Carter: I think that is a good idea.

Mr. Phelps: We will undertake to do that and supply the physical documents, then, as a part of the record.

Judge Lemmon: Yes.

Judge Carter: He has it, but he wants to have them separated. Let us not take the time to do that now. Physically separate them and then present the separated documents.

Mr. Phelps: I should like to call my next witness, if I may. Mr. Lane.

ROBERT A. LANE, called as a witness on behalf of the defendant; sworn.

By the Clerk:

Q. Please state your name and business for the Court and record.

A. Robert A. Lane, senior transportation rate expert, California Public Utilities Commission.

Direct examination.

By Mr. Phelps:

Q. Would you describe, Mr. Lane, your training and experience in transportation matters?

A. Yes, sir. I have been in rates and transportation work for approximately 21 years. I commenced my transportation experience for the Southern Pacific Company in 1935 and I was in general clerical and rate work for the Southern Pacific, rate auditing work also, until the fall of 1938.

On October 1st, 1938 I went with the Comm ssion's rate section staff and was a member of the rate section staff [fol. 963] until the early part of 1942, precisely March 8, 1942. That date I was inducted into the United States Army Air Corps. I went to basic training until June of that year, OCS at Miami Beach, and was commissioned a second lieu-

tenant on December 15th, 1942. I transferred to the Materiel Command at Wright Field in Dayton, Ohio and assigned to the then office of traffic and transportation. I was with the Materiel Command until 1944, at which time the Materiel Command and the Air Service Command were combined, and I was moved in as chief of the rail highway branch of the Traffic Division of the Air Technical Service Command—I believe its name was then—of the Army Air Corps.

I was released from active duty in 1946 and returned to the Commission. I was with the Commission from 1946, again in traffic work, and my experience with the Army, with the Wright Field, was in traffic work, of course.

I returned to my present position and was in that position until 1951. I was recalled to active duty and served at McClellan Air Force Base for six months, and then with the Far East Force for approximately a year in connection with the Korean campaign. This work, again, was in traffic.

I returned in 1953 to my present position and I have been with the Commission ever since to the present time. My work with the Commission involves—I am responsible for the direction, studies involving economic and rate con- [fol. 964] siderations, developing studies, preparing exhibits and reports, and presenting them at hearing before the California Commission; also assisting in preparation of reports and studies of rate matters before the Interstate Commerce Commission.

I am a practitioner before the Interstate Commerce Commission, licensed in 1946.

Q. Does that complete your statement now, Mr. Lane?

A. I think so.

Q. Were you asked, for purposes of this hearing, to prepare a statement showing some representative commodity rates between points in California?

A. Yes, I was.

Mr. Phelps: I have distributed, Your Honors, a three page typewritten document. May we have that marked as the next, identified as the next exhibit?

Judge Lemmon: It may be marked.

The Clerk: Defendant's Exhibit L for identification.

(Whereupon document referred to was marked Defendant's Exhibit L for identification.)

Mr. Phelps: It is entitled "Pacific South Coast Freight Bureau Tariff No. 300, Cal. PUC No. 102, J. P. Haynes, Agent."

That is on the top of the front page. I think that would be sufficient to identify the entire document.

[fol. 965] By Mr. Phelps:

Q. Was that document prepared by you?

A. It was prepared under my direction.

Q. Now, I will ask you the purpose that you had in selecting the commodities, the commodity rates and the commodities which appear on this proposed exhibit.

A. The purpose of preparing this exhibit and showing the rates that I have shown is to demonstrate commodity rates in California. And I might add that these are a very, very small portion of the commodity rates in California. There are literally thousands of them. It is to demonstrate commodity rates in California between principal shipping points that move traffic generally.

The first item, if I may go on to explain this——

Q. Just one moment, Mr. Lane, if you please, just to make clear where this comes from. J. P. Haynes is the publishing agent for certain rails in California?

A. That's right; all of them.

Q. And I take it that these rates you have shown on your first page here are rates taken out of Mr. Haynes' tariff?

A. That is right. Mr. Haynes' tariff 300. He has many tariffs. This is one of them; this is a general commodity tariff.

Q. All right, Mr. Lane. I will ask you to comment, if you will, on such particular rates on page 1 that are significant for the purposes you have outlined.

[fol. 966] A. Well, these rates were—these examples were selected, I might say, more or less deliberately. They are not a random sampling at all. We didn't thumb through a tariff to pick them out. Canned goods is a heavy moving

commodity in California. I don't think there is any doubt about that. I showed the rate into Barstow happens to be in this first item, canned goods, the same as it is to Los Angeles; showed that to demonstrate the extent of the application of this particular rate. Whether commodity rates or carloads of canned goods actually move from San Francisco to Barstow, I don't know, but I do know that they move from this general area: Oakland, San Francisco, Stockton, Sacramento and so forth down to the Los Angeles area, in quantity.

The rate of 29 cents, 80,000 pounds is one of the lowest commodity rates in effect between these two terminal areas, San Francisco and Los Angeles. I wanted to demonstrate that as one of them, one of the lower rates. Most commodity rates in California between these points and these areas are higher than that rate.

Q. Now, you have shown in several places, using as an example the points of origin opposite the commodity "Paint"—you have used the designation "San Francisco." Does that mean that it is limited to San Francisco?

A. Well, it doesn't necessarily have to be. The rate from San Francisco, or the commodity rates and rail tariffs [fol. 967] generally cover an origin area and then they have intermediate application, so there would be other points that would be involved—Oakland, say—and various related points which would move at this same rate. I just showed the one point for simplicity and because of general geography of the State.

Q. Now, at the bottom of the page you show "Soap." Is that a heavy moving commodity?

A. To the best of my knowledge, it is. I showed it for other reasons; also, certainly it is a commodity the military uses, and I wanted to show that we have commodity rates for commercial business for a general commodity such as that.

One of the further purposes of this exhibit, there has been an inference, at least I gathered that inference, that there were no commodity rates in California available for the movement of traffic; there was all class rates. I think that is—I wanted to point out that is not the fact. The class rates, yes, they move l.c.l. traffic and carload traffic,

but I think volumewise the class rates move only about a third of the traffic weightwise. Now, as far as revenue and the number of shipments, I don't have—I don't have that figure offhand, but that is about the extent of it.

Q. Do you have any other comment with reference to the [fol. 968] first page of your proposed exhibit?

A. I think not.

Q. Now, your second page indicates it has been taken from another tariff of Mr. Haynes, does it not, Mr. Lane?

A. Yes. This is a specific commodity tariff; the petroleum tariff is referred to.

Q. Are we to understand all of these rates shown on your page 2 are for petroleum products?

A. That's right. And if I might go back to the first page, and it is the same throughout, the lefthand column, item number, is the reference to the item, either description, and the rate, where these rates came from for easy reference.

The same is true on page 2: lefthand column is the item number for the description and the rate from these tariffs.

Q. All right.

A. I have shortened the description considerably. The tariff description is much longer, but just to point out representative, readily recognized commodities, oil, grease, blended gasoline, and the "et cetera" covers a number of other items, compress e.p.g., that is, gas, and so forth.

Q. Now, you have shown on your page 2 in your column headed with the word "from" group 2, group 9 and group 22. Will you tell us what those mean?

A. Oh, yes. Group 2—Richmond is just one point in group 2.

[fol. 969] There are many other points in group 2, but they are all related to Richmond, Oleum and Richmond and the shipping area——

Judge Carter: Martinez?

The Witness: That's right; yes, sir.

Judge Carter: That whole area.

A. (Continuing) And the same thing is true with Bakersfield: there are a number of other points around Bakers-

field. There are other groups in Lower Valley, 7, Group 8 and so forth. I can't recall the key points at the moment.

And then Los Angeles. The Los Angeles area, group 22 again, that's what that refers to put the group number in there to indicate that this rate doesn't apply only from Los Angeles, but the other related points.

Q. Now, I notice you have a rate halfway down the page, group 9, you have a rate to Lathrop. Does that indicate that there is a commodity rate on petroleum products to Lathrop?

A. That's right. I put it in there because you had considerable testimony about Sharpe Depot, I believe, at that point, and Bakersfield is a producing area. Whether Sharpe Depot ever gets any shipments from Bakersfield, I wouldn't know, but if they did, and using Colonel Flanagan's basis of a reasonable rate, there is at least one basis to arrive at such a rate.

[fol. 970] Q. I see. Have you any further comment on page 2, Mr. Lane?

A. I think not, no.

Q. I think it is largely self-explanatory.

Now turn to page 3, if you will. There is still another tariff of Mr. Haynes, which is called "Trailer Flat Car Tariff." Will you tell us what that means?

A. Yes, sir. Explaining page 3, I would like to preface it with a general comment now about pages 1 and 2. The difference here is that the rates on pages 1 and 2 contemplated under rail application that the shipper load and the consignee unload. They are rail commodity rates as we understand them.

This page 3 and the rates under that tariff contemplate movement of the rail traffic in a trailer, an automotive vehicle trailer of a subsidiary of the rail carrier. The vehicle body, the trailer, picks up the shipment, is loaded in there with use generally of the driver, and it is hauled to a rail yard where it is loaded on a flat car.

Q. That is what is called the piggyback system?

A. Piggyback, yes; that is a colloquialism, I think, to describe it. The trailers on flat cars are hauled over the rail lines to the terminal area and in the terminal area they

are unloaded and delivery is made from the trailer and it is commonly referred to as piggyback or trailer on [fol. 971] flatcar service.

Now, these rates on page 3 are, I think, in some cases, duplicates of rates on the—at least duplicate for the same commodity, canned goods and so forth, where—I thought I had a specific example, but I don't.

Judge Carter: You mean the same item number?

The Witness: No, they are entirely different tariffs, sir. These rates come about by the alternative—authority to alternatively apply the rail rates by competing highway carriers. To place themselves in a competitive situation, the rails have expanded their rail facilities, made them more flexible by the use of this trailer on flat car, and they have in turn, for competitive rate purposes, generally published between points that are on rail heads, the rail rate. These are examples of that type of rate, which involves the loading by the highway carrier subsidiary of the rail and the unloading of that car by the driver of the vehicle, usually.

By Mr. Phelps:

Q. Do you have any further comment on page 3?

A. Yes, I would like to make one comment. Generally, these commodities move under these rates. These rates move these commodities. One I might point out, copper wire from Stockton. I am not, to my knowledge, certain of any movements under that rate. However, again, it is a [fol. 972] commodity that undoubtedly is used by the Army, and we have a movement or rate from Stockton to Los Angeles—I have shown it there—for such a basis of comparison as may be applicable.

I might add this, that rates in the 294, the big book tariff, have just recently been published—in the last two, three or four years, and they are adding to them as traffic develops, and they are rates that are published specifically and definitely to move traffic. On that basis I must assume that these are definite movements of copper wire from Stockton to Los Angeles, although I have never seen one.

By Judge Lemmon:

Q. What is the significance of the two rates in the several instances, and three in one instance?

A. Sir, on one page the first item, canned goods, if I may use that as an example, I bracketed the origin point and bracketed the destination point to indicate that all of those rates, showing 43 at 36,000, a 38 cent rate at 50,000, and 29 cent rate at 80,000 pounds, which applies from all those origins to all those destinations. The significance of all those rates is that at a higher minimum rate they have provided a lower rate, and if you can meet the requirement of 80,000 pounds, you are entitled to the 29 cent rate in that instance. If a lower charge would be arrived at by using a 50,000 pound minimum rate, the 38 cent rate then could be applied.

By Mr. Phelps:

Q. Does that complete your exposition of the second [fol. 973] page, Mr. Lane?

A. Yes, sir.

Mr. Phelps: Cross examine.

Cross examination.

By Mr. McConnell:

Q. Mr. Lane, did you hear all the testimony in the case that has been presented thus far?

A. I believe all except a portion of the testimony yesterday afternoon, yes, sir.

Q. Do you recall the testimony of Colonel Hall at Sharpe, Mr. Stallings, Marine Corps here in San Francisco?

A. Yes, sir.

Q. In which they stated that a great many government commodities did move at commodity rates, isn't that correct?

A. It could be. It could be.

Q. When a commodity rate is readily available, in many instances the government just uses the commodity rate?

A. I recall, sir, a reference by General Flanagan yesterday to that effect.

Q. In Mr. Broz's testimony and likewise the testimony of Mr. Stallings, as I recall it, in both of their testimony—I am not certain about Colonel Hall—they testified about the number of military shipments of small lots and so forth that move under class rates.

A. Yes, I think so, yes.

Mr. McConnell: I have no further questions.

[fol. 974] Redirect examination.

By Mr. Phelps:

Q. Just one more, if I may, Your Honors.

Mr. Lane, is it true under California law that truck carriers by motor vehicles, are at liberty to meet or, that is; to charge these rates which appear in the rail tariff which you have put in your exhibit?

A. Yes, sir. Maybe I was not clear on that. I thought I had pointed that out in part in explaining the reason, one of the reasons for the extension of the piggyback rates, because the highway carriers, motor carriers of California, under the alternative provisions, could apply the railhead to railhead rates for rail transportation. I am trying to distinguish here now rail transportation where the consignee unloads and it goes in a rail boxcar, because under similar circumstances highway carriers are authorized to charge those rates from the railhead to the railhead. The highway carriers, incidentally, have some advantage there because under the rules their driver is authorized to load and unload the shipment even at the rail rate under the alternative application, because that is generally the practice of a highway carrier, and the extension of the piggybacks by the rail lines included that loading and unloading generally.

Mr. Phelps: No further questions.

Mr. McConnell: No further questions.

[fol. 975] Judge Lemmon: That will be all.

JAMES W. MULGREW, called as a witness on behalf of the defendant; sworn.

By the Clerk:

Q. Please state your name for the Court and the record.

A. My name is James W. Mulgrew. I am the director of transportation for the California Public Utilities Commission.

Direct examination.

By Mr. Phelps:

Q. Will you tell us, Mr. Mulgrew, your training and experience in transportation?

A. I have had 35 years' transportation experience. I commenced working with the Southern Pacific in 1920. I went to a company run rate school to acquire some smattering or fundamental knowledge about rates and was then assigned to rate work. I worked rather intensively on rates and tariffs while I was with the Southern Pacific over a period of some seven years.

After that I went with a firm of industrial and commercial traffic managers by the name of Bishop and Baylor. Bishop and Baylor supplied services to industries or businesses of any sort that did not maintain their own traffic department. While with Bishop and Baylor, I handled all sorts of traffic work, including rate work and expediting of shipments, tracing shipments, negotiating rate adjust-
[fol. 976] ments and things of that sort.

In 1935 I came with the California Public Utilities Commission and I have been with them since. I worked first in the rate section. I have been an examiner and assistant director and now I am the chief of the division. I am also a practitioner before the Interstate Commerce Commission, a non-lawyer practitioner.

Q. As director of the Commission's transportation division, Mr. Mulgrew, how many people are there working under your supervision?

A. There are 250 people working in the division.

Q. What sort of personnel are they?

A. They are largely professional and technical personnel. We have engineers, safety experts, rate experts, field investigators, technicians of that sort and, of course, a complement of clerical assistants.

Q. As director of the transportation division of the California Commission, is it your duty, Mr. Mulgrew to advise the Commission on all matters of transportation policy?

A. Yes. My duties there are to advise the Commission and to direct, plan and organize the activities of the division.

Q. I would like to have you give us, Mr. Mulgrew, if you will, briefly a picture of the history of regulation of trans- [fol. 977] portation in California commencing at, I think the appropriate date would be, 1911. Would it not be appropriate to start there? Wasn't that the date of the enactment of the Public Utilities Act?

A. Yes. Regulation as we know it now started in California in 1911. The regulation consisted of the regulation of the railroads and canal companies.

Following that, the next big move was to bring the auto truck, regular routes, fixed terminal carriers under regulation by the Auto Truck Transport Act of 1917. This, however, did not regulate the contract carrier on the highways. As a matter of fact, a controversy arose about regulating them and the United States Supreme Court said that the Commission had no power to regulate them. So there were these increasing numbers of truck carriers unregulated in the State.

In the early 1930's this brought about a rather critical situation in that the regulated carriers are subject to strict rules as to what they shall do on rates. They have a rigid rate requirement that they can not deviate from other tariffs without permission of the Commission. So the unregulated carriers began quoting rates to get traffic lower than the rates of the regulated carriers. There is no real opportunity for the regulated carrier to meet these rates, and then it caused a sort of downward spiral [fol. 978] rates as the unregulated carrier has to reduce to meet reductions of regulated carriers.

In 1932 the California Commission made an exhaustive investigation and suggested to the Legislature that it either unregulate the regulated carriers or put these other carriers under regulation. In fact, I think it said in that report to the Legislature in effect that the Legislature should either put these other carriers under regulation or remove regulation from the other carriers and let the law of the jungle, which is the very language of the report, prevail.

In 1935 the Legislature acted on this report and chose to put the other carriers under regulation. It did not, however, put these carriers under the stringent regulation that the more traditional common carriers were subject to; it gave the Commission power to establish minimum or maximum rates, or both minimum and maximum rates. It did not require, for example, that these new carriers, the highway contract carrier and radial highway common carrier, file their tariffs with the Commission.

Following the enactment of the statute, the Commission proceeded to get facts before it to see what should be done under the new legislation, and this was the start of the minimum rate structure which we have today.

Q. Is it true, Mr. Mulgrew, that there is contained in the Public Utilities Code, Section 726, an expression of [fol. 979] the Legislature permitting all carriers in California to meet their competition?

A. Yes. This expression is to the effect that where the Commission establishes minimum rates, where more than one class or type of carrier is involved, it shall establish the lowest of the lawful rates for any one class as the rates for all classes. In other words, it goes to the low side and provides a plane of equality to compete for business ratewise.

In other words, all classes of carriers have the same rates. If the railroads are the low cost carrier, then the trucks may meet the railroads. If, on the other hand, the trucks are the low cost carrier, then the railroads can meet the trucks.

I might say, too, if I may, that the rates in California, I think, differ from rates in most other states or interstate traffic, in that our rates are founded rather solidly, we think, on the cost of transportation and that is why we

have our staff of engineers to go out and determine costs and the rate experts to interpret these costs and translate them into rates.

Q. Is it true that for many years California, under Section 530 of the Public Utilities Code, carriers were at liberty to charge freight or reduced rates for the United States government or other government bodies?

[fol. 980] A. Yes, they had the unqualified right to do so.

Q. That was applicable to the certificated carriers?

A. Yes, that is, the fixed terminal carriers and the railroads, but it was not the case with respect to the highway contract or radial highway common carriers, who had no such right.

Q. Was there a proceeding before the Commission some time in 1948 that was concerned with the hauling of government traffic by permanent carriers?

A. Yes, these permanent carriers, the contract and radial carriers, came to the Commission disturbed about the fact that they could not do as the common carriers did, make their rates at will for the government.

Q. What did the Commission do?

A. The Commission exempted the government traffic from the minimum rates, thus allowing them equality.

Q. That was on armed forces traffic?

A. On armed forces traffic only, yes. The other federal government traffic, state, county and municipal traffic was not exempted and is not exempted now.

Q. Was that authority granted by the Commission to the permit carriers to deviate for armed forces traffic promulgated in this item 20 which now appears in Tariff No. 2?

A. Yes, that was the mechanics of it.

Q. What was the next proceeding before the Commission, [fol. 981] Mr. Mulgrew, in which the Commission had to consider the matter of transportation of government traffic by carriers?

A. It was a petition filed in 1954, as I recall it now, probably late in 1954, and this petition addressed itself to the problem of getting some working arrangement whereunder there would not be this complete exemption from rates, and a sort of interim order was issued which gave some time to work out the details of the situation. How-

ever, before this could be accomplished, the Legislature, meeting 1955, amended this Section 530 of the Code.

Q. Referring to Section 530 as it was amended by the Legislature last year, Mr. Mulgrew, do you recognize in that statute a legislative policy to give the United States government as well as the state and local government preferential treatment as government bodies?

A. Yes, very definitely. Otherwise it seems to me they would make the government traffic subject to the general provisions that prevail on commercial traffic.

Q. In the course of your advising the Commission upon what it should do under that statute, would you advise them in the light of your recognition of that policy?

A. I certainly would.

Q. We have had some testimony, Mr. Mulgrew, about a number of commodity rates that have been established in California. Mr. Lane has given us a number of examples [fol. 982] of it. Will you tell us, Mr. Mulgrew, what is the theory of the commodity rate in terms of rate-making?

A. Well, the theory of the commodity rate is to establish a lower rate than the class rate, where there are more favorable transportation conditions prevailing, and it is a rate more closely tailored to the demands of the particular traffic involved.

Q. Has the Commission in the past been receptive to representations from interested groups who have requested the establishment of commodity rates?

A. Yes, we have numerous commodity rates in our minimum rate tariffs. We have a separate minimum rate tariff, for example, on cement. In the general commodity field we have commodity rates on canned goods. We have a commodity tariff on fresh fruits and vegetables. We have even in the general commodity tariff a rate on ice between some of the San Joaquin Valley towns. There are quite a number of other items of commodity rates on canned goods Mr. Lane has mentioned.

Q. Is it true that those commodity rates that are presently in effect are applicable only to commercial shippers?

A. Well, they are applicable to the government. They are applicable to anyone.

Q. But they have been tailored to suit the needs of commercial shippers, haven't they?

[fol. 983] A. Oh, yes. We have not had any experience with government traffic because, in effect, of the total exemption of that traffic from our rate regulation. So if our commercially built up or designed rate structure should happen to fit the government traffic exactly, it would be by coincidence and certainly not by design.

Q. And has the Commission had addressed to it up to date any requests for the establishment of commodity rates for government traffic?

A. I think there has only been one, this application of J. P. Haynes, which is already in the record—the decision on the application is in the record.

Q. Was that not, Mr. Mulgrew, a request for authority to deviate from the tariff requirements governing switching in the Barstow area?

A. Yes, it was, and it was granted, and without a hearing.

Q. But up to date, then, as far as you know, you have not had any requests for establishment of commodity rates for the government, United States government?

A. No.

Q. I take it it would follow that therefore there has been no reason to inquire into the reasonableness of any commodity rates for the government, is that right?

A. No, we had no reason to.

Q. Now, there has been some testimony that a number of [fol. 984] these government installations are located at some distance, ten to fifteen, twenty miles outside a metropolitan center. Does that present any prohibitive reason why commodity rates could not be established for government traffic to those installations?

A. None whatsoever.

Q. Do you know of any reason why commodity rates for the movement of government traffic could not be granted upon proper representation?

A. There is no reason, coupled, of course, with the proper showing.

Q. Yes. Now, we have heard testimony, Mr. Mulgrew, from a number of witnesses testifying on behalf of the government that regulation by the State of California will result in delays of the movement of military traffic. Have

you any opinion upon this question whether regulation will cause delays?

A. Yes, I have an opinion.

Q. What is the opinion?

A. My opinion is that I see no reason why it should necessarily cause delays. As I mentioned earlier, the government is, as I see it, at least in a different position with respect to regulation and commercial shippers.

Now, in view of this difference and in view particularly of the fact there is no competition that I know of between [fol. 985] the government and individual shippers at all likely, I should think that the rates could be made effective retroactively much as they are done—much as they are made under the present system. In other words, we could, our Commission could authorize retroactive adjustments of rates.

Now, the second point that I have, on delays, is the difficulty of classification of commodities where large numbers of different items are included in a lot. If I followed the testimony of the government witnesses correctly, it seems to me that that rests on a misconception. It's not necessary under our system of rates that the particular freight for a particular truck be segregated and rated as one shipment. You can make the tender of the entire lot, whether it be one truckload, ten truckloads or a hundred truckloads, as one shipment, and the lowest truckload rates will apply to the entire string of trucks, regardless of how the category may be stowed in particular trucks.

So, as I say, if I followed the testimony correctly, I don't see that there should be any delay attributable to rating, is what I am trying to say.

Q. Yes. Let me ask you first this: With respect to delay, do you understand Section 530 of the Code as empowering the Commission to make rates effective retroactive?

A. I understand it that way, yes.

Q. Now, on the matter of security traffic, we have heard [fol. 986] testimony that state regulation will require the disclosure of security information. Have you any opinion on that question?

A. On that subject, the only thing I see to do is to exempt that by some sort of a general order of the Commission

exempting the traffic from minimum rates or any sort of rate establishment upon certification by a competent military authority that this is restricted traffic, or secret traffic.

Q. Would you be prepared to recommend that sort of an order to the Commission?

A. I would.

Q. Now, I am going to ask you, Mr. Mulgrew, to describe for us, if you will, what are the channels that commercial traffic in California, as distinguished from—I won't say distinguished—I will ask you first of all what are the channels that commercial traffic followed.

A. Well, commercial traffic, of course, runs all over the State, but the main channels are the channels between the San Francisco Bay-Sacramento area on the north, extending from San Jose up on both sides of the Bay, through Oakland, up through the Contra Costa industrial complex, I believe they call it now, and up to Stockton, Sacramento and along U.S. 40 and through Fairfield, and from there down to the Los Angeles area, through both Highways 99 and 101.

In the Los Angeles area, it spreads out, of course, [fol. 987] throughout Los Angeles County and large parts of Orange County.

Then there are smaller lines of channels of traffic, but important ones, between Los Angeles and San Diego, and between Los Angeles and the Imperial Valley.

Those, I think, are the—along with the traffic that is picked up along the route in the San Joaquin Valley, are the principal channels of commercial traffic. That's where the heavy movement is, the volume.

Q. Did you mean to include the San Bernardino area within the Los Angeles terminal area, or is that——

A. No, I did not. That's, I think, in my estimation, a smaller area, not as important.

Q. We have heard a number of examples given of the transportation, Mr. Mulgrew, performed by a carrier bearing the name All State Transportation Co. Can you tell us whether or not that is a certificated carrier?

A. No, he is not. I don't know whether I explained certificated carrier. A certificated carrier is the highway common carrier regulated along with the railroads under the

rigid type of regulation required to file tariffs and not deviate from the tariffs, and so forth.

Q. All State——

A. He is not a certificated carrier. He is one of the permit carriers.

[fol. 988] Q. Yes. Do you have before you, Mr. Mulgrew, —I guess you do not—a copy of Exhibit K?

A. No, I do not.

Q. I will ask you to examine that briefly.

A. Yes.

A. And tell us what, in your opinion, has produced the rising trend of rates prescribed by the Commission in its minimum rate tariff No. 2.

A. The irresistible pressure of increased costs, principally wage costs. They have costs—higher costs have been offset to some extent by technological improvements, better engines for trucks, lighter bodies, so there can be greater payloads and efficiencies of that sort. But in truck transportation it's usually the case that wages alone amount to substantially more than 50 per cent of total costs.

So when there is an important wage adjustment the rates must go along with the increase in cost.

By the way, the contracts on wages usually run from year to year, and there is ordinarily a round of wage increases each year

Q. And have you, as director of transportation, felt bound to give recognition to that trend of cost increases in making recommendations for minimum rates?

A. Yes, not only in making recommendations, but in instituting studies to make available to the Commission in [fol. 989] formation as to the effect of the wage increase.

Q. Have you any opinion, Mr. Mulgrew, upon the question of the desirability of leaving carriers free to quote rates for the government?

A. Yes.

Q. Would you tell us what your opinion is?

A. Well, I think that it creates the opportunity for abuses that would not be present if there were some screening, shall we say, of the government rates.

I believe General Lasher, when he was on the stand, pointed that out as what he considered to be an abuse. As

I recall his language, he said something about the unremunerative rates which were voluntarily offered by truck carriers causing some concern and that he wanted to treat it administratively.

The danger, as I see it, is that—of course, the carriers can't—if rates get below cost, any rates, government rates or commercial rates, the carriers can't long survive, or they will have to offset the unremunerative traffic with higher than necessary rates on other traffic.

[fol. 990] There is a situation here, I think it is peculiar to California, where the carrier making the contract with the shipper in turn hires some other carrier to do the actual hauling. That transaction between the two carriers is not regulated ratewise except in the case of dump truck traffic, and so these carriers, called independent subcontractor haulers, may take freight at less than remunerative rates in order, as one witness said, to get gas money.

Q. Do we have in California a large number of marginal operators who are doing this so-called sub-haul work?

A. We have a large number of carriers that do subhauling. I have no knowledge as to their being marginal or not. I just don't know. There are some 15,000 of these permit carriers, many of them driver-owner operators.

Mr. Phelps: May we have a moment or two, Your Honors?

Judge Lemmon: You may.

By Mr. Phelps:

Q. Mr. Mulgrew, are the class rates in California maximum reasonable rates?

A. No.

Q. What are they?

A. They are minimum reasonable rates.

Q. Minimum reasonable rates. Do these class rates move any substantial volume of traffic in California?

A. Our figures show that class rates in California move approximately 33⅓ per cent of the tonnage, in tons by [fol. 991] weight.

Q. In your opinion, then, are these class rates in California paper rates?

A. No, they are definitely rates designed to, and I think actually do, move a substantial quantity of traffic. We try to get as many—design all class rates so they will fit as much traffic as possible and to supplement the class rate structure with the lower commodity ratings where better than average conditions prevail.

Q. Under Section 530 of the Code, as amended, and the powers of the Commission prescribed thereunder, is any public hearing required, Mr. Mulgrew?

A. No, it isn't required.

Q. And in your opinion, will it be possible for the Commission to set up certain procedures for expediting requests advanced by carriers or by the government itself with respect to government traffic?

A. Oh, I am sure that could be done. We have emergency situations that arise in commercial traffic and they are taken care of. Fortunately, there aren't too many of them.

Q. You feel the Commission, then, as a result of many years' experience, can cope with this kind of application?

A. Yes, I feel so.

Mr. Phelps: Cross examine.

Judge Lemmon: Recess.

[fol. 992] (Recess.)

Cross examination.

By Mr. McConnell:

Q. Mr. Mulgrew, I have a very few questions. Approximately how many trucking companies are there in California now that might, under their Commission authority, carry government traffic?

A. Approximately 15,500 carriers.

Q. Do you have any knowledge of approximately how many of these carriers actually engage in this type of business?

A. I have no actual figures, but I am positive a very small percentage of those 15,000-odd carriers haul government traffic.

Q. Would you say it would be around 100?

A. I really don't know. It might be that low. My impression would be it might be a little higher than that.

Q. I have read your excellent report for the year 1954-1955. What was the gross revenue of the trucking industry in California for that fiscal year, or that year?

A. Oh, I can't say. I can't carry those figures in my mind.

Q. May I read your report?

A. Yes; certainly.

Q. "As a result of the State's growth in population and economic activity or higher character freight, it is expanding its operations to provide the necessary increase in [fol. 993] service.

"The aggregate gross annual revenue of this carriage increased $11,696,720, to reach an all-time high of $550,730,134."

That is correct, is it not?

A. Yes, that is correct.

Q. I also note that in another paragraph, "The fiscal year has been one of freight rate stability"?

A. Yes, that is correct.

Q. In other words, regardless of what might be happening in particular instances in the government traffic, over all in the State of California you would think that the trucking industry as a whole is one that is sound at this present stage of the game, is that correct?

A. Yes, I think we have a very adequate transportation system and in reasonably good financial health.

Mr. McConnell: May I introduce the annual report of the Commission of 1954-1955 as Plaintiff's Exhibit next?

The Clerk: No. 15.

Mr. Phelps: I would like to hear from counsel on the purpose of the offer.

Mr. McConnell: Well, we take it, in a constitutional question of this sort we balance the needs of the State regulation and balance against that the harm that would actually be done to the federal government in the carrying on of its constitutional responsibilities on a national scale, and for that reason it seems to be very pertinent to know whether the situation here in California as a whole demands any drastic action at this time.

Mr. Phelps: I have a little difficulty, Your Honors, seeing the materiality. I would like to record my objection on the ground of materiality.

Judge Lemmon: Overruled. Received.

(Whereupon Commission's annual report for 1954-1955 was received in evidence and marked Plaintiff's Exhibit No. 15.)

By Mr. McConnell:

Q. Now, Mr. Mulgrew, prior to the time that the Legislature amended Section 530 and subjected the shipments of government property Commission regulation, did a committee of this Legislature request a study by your particular office with respect to the conditions?

A. No, it did not.

Q. Did the Commission appear before the committee and recommend such action?

A. No, it did not.

Q. Mr. Mulgrew, you stated that there had just been one application to date for the Commission's approval on government rates, is that correct, sir?

A. I think I said one application for commodity rates on government freight.

[fo 995] Q. Commodity rates?

A. Yes, sir.

Q. I will show you— Can you tell us when that application was filed? I have the papers here. Instead of introducing a voluminous evidence, I think we might just do it orally. (Handing document to the witness)

A. Apparently some time between November 4th and November 7th, 1955. It shows a date transmitting to the Commission on the 4th. I assume they received it either that day or the next day.

Q. Did you send a letter to the applicant on November 7th?

A. Yes.

Q. And in that letter you stated that the applicant should send his application to the trucking association, is that correct?

A. Well, I said he should—we said he should mail a copy of the application to the California Truck Owners. That is a procedure where we try and have all interested advised of any filings. We did make that specific suggestion.

Q. Yes. Does that contemplate that if anyone who is interested in the application had some objection to it, that he might appear before the Commission and state his objection?

A. Oh, yes. It contemplates that if there is a controversy [fol. 996] about it, that in all probability there will be a hearing and no decision until after the hearing, unless there is some very unusual and critical matters involved that require action before the hearing. And the opponents, of course, would get a chance to make their views known.

Q. In other words, I take it, your Commission is assiduously careful to afford a fair hearing to any interested party in a rate adjustment?

A. Oh, yes, indeed.

Q. When was the order approving this application issued?

A. 29th of November.

Q. Did anyone protest or anyone file any objection thereto?

A. No, there was no protest or objection.

Q. When was the order to become effective?

A. On its date, I believe. May I see it for a moment?

Q. That is right; on its date.

A. Yes.

Q. Just one other thing, Mr. Mulgrew, that in my haste I overlooked: Are you familiar with the average amount paid by the government for the shipment of its materiel in California in any one year?

A. No, I am not.

Q. If I told you the figures that were submitted before the Commission by the Department of Defense in a proceeding before the Commission in 1955 for the year 1954, [fol. 997] would you roughly say that that was the correct amount?

A. Well, I would accept your figure.

Q. That is approximately $19,000,000—approximately $20,000,000.

A. Yes.

Q. And the approximate gross revenue from the trucking industry in California is $550,000,000, is that correct?
A. That is right.

Judge Carter: What did you say the $20,000,000 represented, Mr. McConnell?
Mr. McConnell: The amount the government expended in intrastate traffic in California.
Judge Lemmon: For what year?
Mr. McConnell: For 1954. As contrasted to five hundred fifty million for the same year.

Q. I take it this is in 1955-1954?
A. Well, our annual report runs on a fiscal year basis, July 1st to June 30th.

Judge Carter: And that is the calendar year?

A. I believe that is the calendar year that was shown me.

By Mr. McConnell:

Q. In your annual report?
A. No, fiscal.

Mr. McConnell: I am advised that it is fiscal year, the federal fiscal year, which I would think would certainly be the case.
[fol. 998] Judge Carter: Then that would be for the fiscal year 1954-55, the same as the report?
Mr. McConnell: Same as the report.
I have no further questions.
Judge Lemmon: Any redirect?
Mr. Phelps: Yes, one or two more, if Your Honor please.

Redirect examination.

By Mr. Phelps:

Q. Mr. Mulgrew, you stated that there were approximately 15,500 carriers in California who could carry government traffic. I will ask you, approximately how many of those carriers are certificated carriers.
A. Approximately 500.

Q. And those are the carriers who have a legal obligation, do they not, to transport traffic for the public?

A. Yes. They are common carriers in the sense that they must serve all who tender them traffic within the limit of their common carrier undertaking.

Q. And they have an obligation, do they not, to follow a regular route for the transportation of that traffic?

A. Yes, they do.

Q. To establish schedules for it?

A. Yes.

Q. Now, in this application which has been referred to by counsel on cross examination, the application of Mr. Haynes, do you know of any representation that was made to the [fol. 999] Commission in connection with that proceeding that time was of the essence?

A. I have a recollection that it was urged that this was an important matter and should be disposed of promptly, yes.

Mr. Phelps: If Your Honors please, I think I have not yet offered in evidence Exhibit L for identification. That was Mr. Lane's exhibit of three pages showing commodity rates in California.

Judge Lemmon: It will be received.

(Whereupon Exhibit L for identification was received in evidence.)

[fol. 1000] Mr. Phelps: I now have put together, Your Honors, certified copies——

Judge Lemmon: The documents in case 5432?

Mr. Phelps: Yes.

Judge Lemmon: We will receive it in evidence and it will be given an exhibit number.

Mr. McConnell: That is the material that was attached to your memorandum?

Mr. Phelps: That is right.

(Whereupon the documents referred to were received in evidence and marked Defendant's Exhibit M.)

Judge Lemmon: Any further questions?

Mr. Phelps: No further questions of Mr. Mulgrew.

Mr. McConnell: No further questions.

Mr. Phelps: If Your Honors please, before the defendant rests, Judge McKeage should like to address to the Court a stipulation.

PROPOSED STIPULATION BY MR. McKEAGE

Mr. McKeage: If Your Honors please, what I am about to present has precedent in that this was done in the United Air Lines case which has been cited to Your Honors in a motion to dismiss. This was permitted by the Supreme Court of the United States, the type of stipulation which I will offer. It is not a stipulation that I ask the government to accept. That is not necessary. But it is a stipulation by which I in my official capacity will be bound.

[fol. 1001] It also has precedent in the case of American Telephone & Telegraph Company v. the United States, 299 U.S. 232. This will be offered to rebut the evidence which has here been offered as to the view of the witnesses on behalf of the United States that the Public Utilities Commission will execute this statute in an unconstitutional manner. In line with that, I know Your Honors are aware of the fundamental rule of constitutional law that unless a statute is unconstitutional on its face, a court must presume that the official charged with the execution of such a statute will execute it in a manner not offensive to the Constitution, the burden being on the party assailing the statute to show the contrary. If two conclusions may reasonably be drawn from the facts, one that the statute is unconstitutional and, two, that it is constitutional, the court must adopt the latter conclusion.

Now, it is in that setting that this is offered and, as I say, it was offered and accepted by the Supreme Court in the United Air Lines case, this same thing, that is, of the same nature.

I am the attorney and chief counsel of the Public Utilities Commission of the State, which is the defendant in this case, and as to my authority to do what I am about to do, I will call Your Honors' attention to Section 307 of the Public Utilities Code, which reads as follows:

[fol. 1002] "The Commission may appoint as attorney to the Commission an attorney-at-law of the State, who

shall hold office during the pleasure of the Commission. The attorney shall represent and appear for the People of the State of California and the Commission in all actions and proceedings involving any question under this part—"

That, of course, refers to the Public Utilities Act and cognate statutes—

"—or under any order or act of the Commission. If directed to do so by the Commission, he shall intervene, if possible, in any action or proceeding in which any such question is involved. The attorney shall commence, prosecute and expedite to final determination of all actions and proceedings directed or authorized by the Commission; advise the Commission and each Commissioner, when so requested, in regard to all matters in connection with the powers and duties of the Commission and the members thereof; and generally perform all duties and services as attorney to the Commission which the Commission may require of him."

As Your Honors probably know, the Public Utilities Act of this State is a peculiar statute in that it is placed above the Constitution of this State by the very provisions of the Constitution itself, and that has been so interpreted by [fol. 1003] the Supreme Court in the bench mark case of Pacific Telephone & Telegraph Company v. Eshleman, 166 Cal. 640. I offer that as my authority to make this statement which I will make with regard to the reasonableness of the execution of this statute, Section 530 of the Public Utilities Code as amended in 1955 by the attorney and chief counsel for the Commission and the Public Utilities Commission itself.

I will stipulate that I will officially advise the Public Utilities Commission that it has lawful authority pursuant to Section 530 of the Public Utilities Code of California as amended in 1955 and other provisions of that Code, to authorize any carrier to negotiate with the United States with complete freedom concerning the transportation of any property of the United States which may involve security matters, provided only that the carrier require a certificate from a responsible federal official, which cer-

tificate shall be filed with the Commission, that such transportation involves security matters; and in my opinion, such advice will be accepted by the Commission and acted upon.

I further stipulate that I will officially advise the Public Utilities Commission that it has authority pursuant to Section 530 of the Public Utilities Code and other provisions of said Code to grant any and all lawful authority requested under said section of said Code without the necessity of a [fol. 1004] public hearing, and grant such authority effective immediately, and that such advice will be accepted and acted upon.

The Supreme Court of this State has held that the Commission may make its orders effective immediately. That was decided in Clemens v. Railroad Commission back in the early days. There were no exceptions, the court pointing out that the Legislature under the provisions of the State Constitution could have taken all review authority away from all the State Courts. So therefore it held that if the Commission wanted to make its orders effective immediately, and that applied to all orders of the Commission, but peculiarly under this Section 530, which is so very flexible and grants such broad authority to the Commission, that I will offer that as my stipulation that that is the legal effect of it, that I will so advise the Commission, and in my opinion they will accept and act upon it.

Mr. McConnell: May it please Your Honors, I have just one comment to make, and it is a reiteration of observations made by us at the very outset of this case and the witnesses on the stand. The United States has the highest regard for the Public Utilities Commission of California and in no way questions the fact that in every way possible they will cooperate and help the federal government. However, as we stated at the outset, this question has become one that is [fol. 1005] national in scope. The power is a matter with which we are concerned.

Judge Lemmon: This is hardly the place to argue these questions. We will take up the matter of argument later on. Now I would like to know from you if both sides rest.

Both Sides Rest

Mr. Phelps: The defendant rests.

Mr. McConnell: The plaintiff rests.

Colloquy Between Court and Counsel

Judge Lemmon: What is the desire of counsel in the matter of argument? Do you want written argument, oral argument or both? We thought you would probably want a little time to marshall this evidence and probably you would be in a better position then to present it. My position is you might set this down for argument some day, and if you desire to supplement it by something in writing, or the Judges would like to have that, we could take it up at that time.

Mr. McConnell: May it please the Court, I have an argument on appeal in which I have not written a brief in Texas on April 11th.

Judge Lemmon: That is the date I was going to suggest to you.

Mr. McConnell: That is in Austin. They set my brief date. They gave me five days' extension. I still have to get it in there by April 4th. Then I have gotten involved in a jury trial in a case against General Motors in Wilmington, [fol. 1006] Delaware, which is about the worst place I have ever been for trying a jury case. That has been set for May. We originally designed our brief to set forth our position on the case as a whole, in the brief on the motion to dismiss, and we would like to participate in any oral argument and write a supplemental brief.

Judge Lemmon: The matter of oral argument some time during the week beginning April 16; would that be satisfactory?

Mr. McConnell: At the Court's pleasure.

Mr. Phelps: Yes, Your Honor, that will be satisfactory.

Judge Lemmon: How about Thursday, the 19th?

Mr. Phelps: That will be satisfactory.

Mr. McConnell: Yes.

The Court: The case will be continued for argument the 19th day of April.

Mr. Phelps: Mr. Poe requests Your Honor in the matter of allotment of time an opportunity also to be heard.

Judge Lemmon: How much time does counsel wish?

Mr. Poe: I have not heard anything said about the time yet.

Mr. Phelps: I would suppose an hour would be sufficient.

Mr. McConnell: An hour would certainly be sufficient for our position.

Mr. Poe: I would not care for more than half an hour. [fol. 1007] Judge Lemmon: Very well. That will be the understanding.

Mr. McConnell: If it please the Court, if the defendants have an hour and a half, I would take it the government would have equal time for rebuttal.

Judge Lemmon: Yes.

Judge Carter: Of course, Mr. Poe is not now appearing as a defendant. He is appearing amicus curiae, but I do not think that should create any technical argument so as to correct the record.

Mr. McConnell: I notice there is another amicus curiae in the manufacturers' association.

Judge Carter: They have not asked for the time to argue.

Mr. Poe: So there will be no uncertainty about my position, it should certainly be understood that my appearance as friend of the court will be in support of the Public Utilities Commission.

Judge Lemmon: That is understood.

Mr. McConnell: May it please the Court, just a matter of detail. There are some exhibits that have been given here by the Navy, just only one copy. May we be permitted to photostat them?

Judge Lemmon: Be satisfactory?

Mr. Phelps: Yes, indeed.

Judge Lemmon: You may substitute photostats for the originals.

Court will be at recess.

[fol. 1008] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Hon. Dal M. Lemmon, Judge; Hon. Oliver J. Carter, Judge; Hon. Oliver D. Hamlin, Judge.

No. 35101

UNITED STATES OF AMERICA, Plaintiff,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Defendant.

REPORTER'S TRANSCRIPT OF ARGUMENTS TO THE COURT
APRIL 19, 1956

APPEARANCES:

For the Government: E. Riggs McConnell, Esq. and James J. Broz, Esq.

For the Defendant: J. Thomason Phelps, Esq., and Everett C. McKeage, Esq.

As Amicus Curiae: Arlo D. Poe, Esq., and Hugh Gordon, Esq.

[fol. 1010] Judge Lemmon: The three judges have been discussing the matter of argument. Of course, the legal problems were fully briefed and argued before the judges, and we are quite conversant with the views of both sides as far as legal arguments are concerned.

I assume you would want to argue the facts, but I would suggest in the interest of saving some time it would be just as well for you to stay away from the legal problems in the case. Of course, I know in arguing the facts you are disposed to bring in the legal questions relating to the facts, but I hope that counsel will appreciate that we are quite

familiar with the legal problems which have heretofore been submitted to us; just a waste of time to go over those further.

You may proceed with the argument.

Argument by Mr. McConnell on Behalf of the Government

Mr. McConnell: May it please the Court, without going into any of the legal details of the questions presented in the case, I would like to just discuss briefly the historical setting of this proposition that is now before the Court because I think it must be projected against a rather broad historical background in the end, and this is more or less a matter of fact, broadened.

Of course, we are dealing here primarily with the power to supply the Armed Services. The Constitutional Convention, of course, in the summer of 1787, that was one [fol. 1011] of the primary reasons it was called, to provide for the common defense provided for in the Preamble of the Constitution and Article II. Congress had given the power to raise taxes for the common defense, had the powers to support the Navy and the Army and the powers to wage war.

We are dealing here with the supply function for supporting the Army, the Navy, and incidentally, though we don't allege it, the power to wage war. I do think, since this is a case of first impression, that it is important to bear in mind that we are dealing with one of the most vital powers that there is in the Constitution today, and we are dealing with one of the most vital parts of that power, the power to supply the troops in the field.

Down in Monterey—it was the first time I knew it—General Sherman was Quartermaster at Monterey; General Grant was Quartermaster in California and in Mexico. The great general officers have known the importance of this supply function. General Lasher, when he testified, testified to the fact that in the Korean situation when they were moving up and down the Korean Peninsula, motor transport broke down for failure to have spark plugs.

Illustrations of that are multiple. At the battle of Tarawa the supply function broke down there, they had to

cross a coral reef. The Marine Corps already had the technique of transferring from Higgins boats to amphibious [fol. 1012] tractors at a coral reef. And they used that technique at Guam and they used it in every engagement. The supply system broke down and there were no amphibious tractors, and that was a labor dispute. The Higgins boats bogged up on a reef and the two battalions waited ashore under fire.

Illustrations might be given in that connection ad infinitum. The old thing: the shoe is lost for a nail and the horse is lost for a shoe, and the battle was lost.

So here we are dealing with the power that is the most vital one we could be dealing with. It's a matter of life and death to the troops on the line, it is a matter of national survival. You cannot estimate what a breakdown in the supply lines will do.

Now, as we stated in our brief and stated previously, this power has never been completely analyzed so far as the state regulation is concerned. It is a matter of first impression; it is a matter for all times. We may be in a state of semi-peace now, but no one can gainsay that it's not a period of crisis.

In considering this essential power and state regulation that impinges upon it, there is only one criterion brought up over and over again, and that is to balance the interest of the national government and the power against the interference that the local regulation has. That is set forth broadly in the quotation from Justice Stone in a case that [fol. 1013] arose in California and it's repeated over and over again. In reaching a judgment it is respectfully submitted that that is the only criterion on which a judgment can be based.

Now, going into the problem from this broad general area and getting to the facts of record, how will the regulation of rates by the State Commission interfere with the supply lines of the United States?

First—and it was fully developed in the evidence—it is essential to bear in mind the nature of the rate structure and the rate making process, that is, a class rate structure. As pointed out by Mr. Pistor and by General Lasher and

as intimated by all the other witnesses, theoretically there has to be a rate to cover every commodity between every point in the United States and back again. Many times these commodities are fitted into this class rate by what we call the rule of analogy.

For example, if you ship a camel and there wasn't a particular provision, because it is impossible to catalogue every human commodity or thing, you would get an analogy to a burro, or something of that sort, if that was the closest thing for the utility or that type of animal—desert animal.

Now, it is commonly known that the class rate structure is something that serves a useful purpose in the sense that you will always have available some sort of a retail rate, something of that sort, so you will always be able to ship [fol. 1014] rapidly. But it is commonly known that very little of the commercial and heavy traffic moves under class rate. Mr. Pistor, in his testimony, testified that from recent studies made by the ICC, only 4 per cent of commercial traffic moved on the class rate.

Now, as the evidence also indicated here by analyses of representative bills of lading, and something that must be admitted by all concerned, the class rate in a great many instances is 40 or 50 per cent higher than the going rate that they worked out in commercial traffic when a big concern will sit down with them and enter into a well known groove of traffic, will go to the traffic manager of the various carriers and work out a rate for commercial purposes.

Now, from the nature of things, military traffic, as brought out by General Lasher and all others concerned, all other witnesses, government traffic does not move in any predictable pattern. Its commodities are not the same.

Time is far more important since it is supplying the Armed Services. Accordingly, the situation arises over and over again where there is no level of rates that are comparable to the normal level of rates in the rate-making processes which would be available for similar types of shipments. There are many illustrations of this given in the evidence. Probably one of the most striking ones is the one that came up while this proceeding was pending: [fol. 1015] the training of an army unit at 29 Palms by the Marine Corps.

That entailed a number of, I take it, tanks and guns and things of that sort. There was no available commercial rate to cover that type of traffic. Accordingly, through its normal processes the Marine Corps made an arrangement with the railroad and in a matter of days, a matter of just one day, actually, this movement took place.

As the evidence will show, the testimony of the witness Stallings, there was a saving one way of $10,000 on this particular movement. It would have cost $31,000, and I think the rate as negotiated was $19,000.

Well, that is a typical illustration of the impact of the class rate structure on the necessary requirements for government shipments.

Now, from the nature of this rate structure and its theory on which it is predicated, so often the United States would be placed in a Hobson's choice. The movements must be made and they must be made quickly to sustain the troops in the field, training operations now, expeditions that they must take now, they must be made quickly and the government has to decide whether or not to wait, if the Commission can regulate it, because there is no existing rate, to try to work out a rate with the Commission, so they'll have to make it at the higher rate.

Now, we don't say that mere cost should ever control in [fol. 1016] a matter of this sort, but it is an important factor and it's important in that it brings this dilemma upon the part of the government, important in that the rate that must be paid under the pressure of the circumstance and exigencies of the situation will be higher than paid by the normal people.

Now, of course, related to that and something that is also involved in the class rate structure is the fact that it is the usual rule. There is no provision in the Commission regulations for freight all kinds; that means a mass of material of many different items shipped in one car—200, 300 items. Mr. Stallings, Mr. McKinney, and other witnesses brought forth specific illustrations which they stated were representative. The Marine Corps stated that it had examined 40 bills of lading taken at random, and they showed how the abolishment of the freight all kinds rates would place them in the class rate structure, and

a very high class rate structure, because Mr. Stallings of the Marine Corps testified that under the class rate system one package will take the classification of the highest item. I think he gave as an illustration a kit of some sort that was to be used in a unit in the field for repair of electronic equipment. They might have in there some tubes.

Now tubes, glass tubes, would take the very highest class rate; or field desks, for example, which is the sort [fol. 1017] packed up as a unit and sent down, it will have a sponge.

Now on a normal rate classification that sponge sets the rate for the whole mass of articles in that particular box.

That is true, that is always within the power of the Commission to maybe allow freight all kinds, but the fact is they do not have freight all kinds now, and the fact is it's not normal for regulatory bodies to provide for this. It's always an area of struggle, implications in it that are not in the record here. I noticed in other places they do have some sort of freight all kinds in a more or less switching arrangements in the city, and that kind of thing, and now and then there are exceptional cases. But that isn't the usual type of commission regulation that permits this thing, which is absolutely essential to the government.

Now; moving from those two things that would throw the government into an inequitable rate, and the record is just replete—it's repetitive in that regard—to the other hindrances that will be thrown in the way by the regulation of the rates.

First, of course, it's closely related to the freight all kinds, the mere matter of classifying and conforming with the normal classification requirements will be time-consuming.

Now, there is some dispute in the evidence here with respect to whether or not there has to be classification [fol. 1018] under the California statute. Certainly all of the people in charge of the traffic operations for the government feel that they will, because they took representative shipments and did what they thought would be re-

quired under the regulations. It is true Mr. Mulgrew didn't completely understand the implications of his testimony; seemed to feel that would not be required. Be that as it may, normally the compliance with the class rate does entail the segregation, the boxing, the making out of additional bills of lading and the more specific description, and it would be time-consuming and expensive.

And so there again you have a direct impinging here that would cause delays in military shipments when time might be of the absolute essence.

Now, there is another aspect of the matter that flows from this sort of hiatus between the class rate and the going rate. It would create a sort of tension between the arms of the services. Here is the Transportation Corps with, say, a $500,000,000 allowance for transportation in any one given year. And every effort must be made to keep the budget as low as possible. That's essential at this present time. You would have the Commanding Officer and the officers on the line and the officers carrying on an activity, as it has always been, they would want the material and they would want it now. These things blow up quickly. The transportation officers would be prone to [fol. 1019] wait to see if they couldn't work out with the Commission some rate that would be equitable, and it would be their duty to do so.

So here you would have another tension between various two separate arms of the services; one wanting the thing immediately, the other one holding it back.

As the testimony by Mr. Mulgrew illustrates, we just had one shipment where they showed how the California Commission would operate under this regulation. That was a request by the Marine Corps, the railroads, for the approval of a rate relating to Barstow, which was first put into evidence by the defendants, then on cross-examination Mr. Mulgrew reviewed the history of that decision. When the application was received, which I think was November 7 of 1955, he immediately advised the Marine Corps and the appropriate carriers that they would have to submit it to the trucking association—these happen to be railroad carriers—and on cross-examination he stated the purpose of that was for the trucking people that were interested

in it for them to file an objection and go into the question of the reasonableness of it.

In this particular instance the trucking association did not do that. Nonetheless, it took just about a month for this uncontested pro forma thing to be processed through the Commission.

[fol. 1020] That is the only illustration we have in the record of how the Commission works at this present time. Whether that would be shortened or not, you can never tell. But as I stated at the outset, this is for all times and for all places. What will happen in connection with other commissions, you can never tell.

Now, the next thing that is illustrated and is clearly related to what we have already mentioned, is the increased amount of paper work.

Now, as General Lasher pointed out that with the Versailles army—the Versailles treaty provided for the chairman of the military establishment,—is allowed 100,000 men. Now, the thing that was unique about that, that grew into the Wehrmacht, which is supposed to be the greatest military machine since Genghis Khan, was that every one of those men carried a gun and every one of them was prepared to move into action. It was out of that cadre that the Wehrmacht came,—and the more you can cut down this paper work, as far as soldiers are concerned—as a matter of fact, it's the worst kind of training for action, someone sitting at a desk doing that kind of thing. You throw him out of the action, and not through any fault of his but just from the projection from one thing to another, you will have a failure.

Now, Colonel Hall testified, and Mr. Stallings of the Marine Corps testified, General Lasher testified, that down [fol. 1021] on the operative level the paper work would be greatly increased. Closely related to that is the increase in personnel. Here you have the same thing, it gets back to the history of the Wehrmacht; too many people on administrative work, and it costs a lot *of* maintain these people.

Then another thing that came out very clearly: if we have these commission regulations of rates throughout the country, naturally you are going to have to have a great deal

of appearances before the commissions themselves. Colonel Hall and General Lasher, in both their testimonies, intimated that you would have to have a separate group of people that would be charged with this responsibility in certain areas, because it is a rather tedious and elaborate process, preparation of exhibits, the testimony, to work out a rate that is sound; if the thing is going to be done anywhere nearly in a proper way it's going to have to be done with study and the presentation of the problems and facts underlying the problems.

So there you would have increased paper work, tied up personnel in this particular type of activity, which really, as we will point out later, seems to us to have little value.

Now, there is another aspect of the matter that is so clearly brought out in the evidence. We had each witness from each service describe the nature of the installations [fol. 1022] in California and their relationship to the depot system as it was situated throughout the United States. Now, that was designed to demonstrate that this is a nationwide matter, a flow, a constant flowing of materiel to meet the particular strategic, tactical situation at any time. Normal military materiel doesn't have any actual resting place until it is consumed on the line or in some military operation.

One depot backs up another. Take a thing like Barstow, as testified by Colonel Eastham. 95 per cent of the movement is from outside of the state, a lot of it goes into activities that supply a division which may be moved out at any time—that was brought out. Even Stark General Depot, which is normally a housekeeping depot, Colonel Hall testified that about 90 per cent of that either came from out of the state or went out of the state. It's a procuring center for canned goods, as he brought out, since California supplies so much of that for the nation as a whole; but most of the canned goods which come into Stark, as he testified, funnel out into the Eastern Seaboard and all the other installations throughout the country, and overseas as well.

So it would be very difficult to determine what materiel, as stated by General Lasher, in this nationwide and worldwide pipeline would be in purely intrastate commerce under constitutional conceptions, or would not be, in fact,

in the current of commerce under the concepts as have [fol. 1023] been developed by the Supreme Court. Many, many items which would appear on the surface to be from one point in California to another, if analyzed, would certainly be interstate under the doctrines of the court.

Now, the local people, the traffic officers, the transportation officer in charge of these installations are on a mandate now which comes from the President of the United States, as we know by reading in the papers, to keep the expense of the military establishment as low as possible. There you would have the advice of counsel and determination of what actually would follow under these state regulations. The United States, in its present situation, cannot waive any right of that sort when it would throw it into a greatly increased expense.

Then closely related to that is this very difficult problem of determining what is the status of one installation, shipments from one installation to another are within the jurisdiction of the United States. The confusing problem—we introduced into evidence an exhibit which showed an exchange of letters between Governor Warren and Secretary Stimson in which a long list of installations in California were conveyed by the state which expressly excluded jurisdiction to the United States. And we have the opinion of the Attorney General which tries to interpret that.

You have another confusing area. The thing that we see [fol. 1024] is the taking into consideration this state and 48 other states putting these things in, you would have a state of confusion, friction, litigation, and you would go through a long process of trying to work out something that has really very little, if any, relationship to the essential problem involved.

Then another aspect as so clearly brought out in the evidence is the use of these transit arrangements, which is closely related to the interstate commercial feature. Colonel Hall testified with respect to the typical illustration of Sierra Nevada where ammunition is intermingled, comes from all over the Middle West, most often, and it is all mingled with ammunition of like character. The railroads allow this transit privilege, which has been worked out for practical purposes on a very simple arrangement.

They take it, the ammunition or the other forms of property, just as you would take a bin of wheat, and if they have a certain amount in there that was on a transit privilege, they will ship a certain amount out under the transit privilege, and will not try to segregate where the particular material came from.

Now query: whether or not in the regulation of this sort where you try to get right down into a determination of jurisdiction of the Commission, whether or not you would not have to require segregation of ammunition that [fol. 1025] found its whole history,—or the segregation of canned goods, its whole history within the state to determine the jurisdiction.

Well, that would do away with this very convenient and practical method of fluidly and flexibly shipping from one point of the nation to another destination in the nation with storage at an intermediate point in between for whatever purpose it might have.

And then last, but not least, as was brought out by General Lasher, and very explicitly, and every other witness who testified, from his own installation and experience, is this element of security. Now, there are two aspects of that. First, there are many shipments, as brought out, which you do not want to reveal the essential information of the shipment.

Now, in the present system those shipments can be made. You carry the statutes of the state of California and the other states to their logical conclusion; if they mean anything at all, they mean you are going to have to parade a lot of this information, at least before the staff of the Commission, the Commission itself, and certainly in many states you have to parade it at a public hearing—whether or not you would have to do that in California seems to me moot—but there certainly is some constitutional implication in denying a free hearing, and you would have that question that would be raised.

[fol. 1026] Now California, as the evidence particularly of Mr. Broz shows, is particularly sensitive as far as secret movements are concerned. You can read the paper every day, and yesterday's paper for the first time they revealed in a limited way a certain testing area for guided missiles

down just outside of Los Angeles. Nobody knew about that thing, I take it wasn't supposed to know it, yet those things down there have been going on since 1946.

You have these installations, the warning systems—that was brought out by Mr. Broz and Colonel Hall, too. They don't know where the warning systems are situated, they don't know what material goes there. It's as vital as can be, and those movements have to be made under extreme secrecy.

Now, movements of that sort can be subject to a state regulation, and there are so many of those types of movements made in California, as testified to by witness after witness.

There is another aspect to the security thing brought out by Colonel Hall, who testified, as you recall, from his experience abroad, that a skilled espionage agent can tell an awful lot just by any kind of movement. He can tell the strength of a division, tell the state of training, have all of these things. In Europe you don't have a full parading or flowing of materiel to the troops, and it's almost unthinkable that you would make available to astute people [fol. 1027] a mass of information of this sort.

As Colonel Hall testified, he has some movements that take place where he has to get out alternative routes that are circuitous, in many instances, and then the FBI tell him which route to use.

Anyone that has had any experience with movement of troops knows that you take—someone was telling me—you take a group of pilots, for example, that are going to embark. The illustration told me, the Battle of the Bulge was going on and they had the pilots going out. They went out all over the country before they went to a port, and a thing of that sort is essential. They route many troops across the country; security is of the utmost importance. The country is so large that sabotage always endangers.

You have these factors that are clearly developed almost by every witness, and repetitive in some regards, which shows the regulation by one commission in California would absolutely cut into the supply lines in the most vital and drastic way, and that in a time of peace. Justice Marshall said that we have to project this thing to the most stringent

requirements of the time of war. That's one side of the horn.

Now, from the record let's look what good does such a regulation do the citizens of California. It hurts the United States Services, that is clear. The people who are dealing [fol. 1028] with the problem on the line are unanimous in that regard; there is no dissension. Colonel Hall, who has had great experience, as you remember, "It would be chaos", if this restraining order were lifted he wouldn't know where he was,—less than carload rates, he said, if the thing were allowed to go into effect next month.

Now, what good does a regulation do the citizens of California as a whole? Well, in the first place, in that regard, it is implicit—most regulations of rates, if you look at it from the standpoint of the citizens as a whole, certainly in the history of rate regulation, as it grew out of the situations that existed after the Civil War, were to avoid discrimination to shippers and to persons and localities. That was the basis of the early rate regulatory statutes, and in this particular instance, in government shipments, military supplies, they do not compete with anybody. There is no possibility of any prejudice to any person or any locality.

There has been drafted into the transportation statutes and the theory of rate making the obvious idea, which found its ascendancy in the NRA and experiences of the depression when the railroads went into bankruptcy, and later in the transportation policy of the Act of 1940, that you must, to have a healthy transportation system, avoid the distress that comes from cutthroat competition. Now, [fol. 1029] that is the sole basis, as I take it, that the defendants are justifying this statute on.

Now let's examine that in the light of the record. First, whom does this statute actually affect as far as carriers are concerned? Even Mr. Mulgrew, on cross-examination, said that probably as few as a hundred carriers were involved in this particular type of business. It's a highly specialized type of business, frequently requires specialized equipment, particularly as far as trucks are concerned, because many times it is a heavy kind of equipment. The

people must be sophisticated, because the commodities are so different. I mean, they must know their cost element.

You have a lot of very light commodities in great bulk, like the floaters used on aircraft, and things of that sort—fusilages, things of that sort. It's a highly specialized business.

Colonel Hall testified that within the past I think six months, down at Sharpe General Depot they just used six carriers. I think Mr. Stallings of the Marine Corps testified that there they used probably 20. Mr. Broz testified—from the Air Force—they did use a larger number, probably 80 within a span of a year. But here are 12,000, to put it conservatively, carriers in the state of California, who, under their authority, are able to carry on this business. A relatively few are doing it. It's apparent from the [fol. 1030] record that it is not their full time business, but something that supplements them in other ways.

So when you look at the picture of the distress of the transportation industry here, it becomes apparent that actually there isn't that deep, broad effect of any flurry of competition of that sort on the transportation structure, obviously.

Now, the second thing that came out, as is very apparent from the testimony of Mr. Mulgrew, the witness for the Commission, this is not a period of distress for California trucks. The total income last year was $550,000,000 roughly. Under his report in the fiscal year with which we are dealing, 1954-1955, the total increase was $11,000,000, the highest peak ever reached by the transportation industry in California. Distress is not in the record, no element of it is in the record.

There is another aspect of the matter that is not considered inappropriate to mention—the fact that none of the people who signed this rhetorical statement that instituted the proceedings before the Commission to try to avoid a matter of competition of some sort, wasn't gone into. None of them took the stand. There was no evidence here of any bankruptcies. In Texas—I don't want to violate the proprieties and go out of the record—the truckers did take the stand. As Cicero said about Cataline, [fol. 1031] "There's a time when your silence shouts." If

they were in distress, this limited group, why didn't they come and show their distress?

There is no basis. Of course, we realize that the government, in raising this serious question as to the constitutionality of the statute, has the burden, but there is some point where responsibility of going forward with the evidence must shift, and we respectfully submit that this record clearly reaches that point when the government's case was put in.

There is another aspect of that that was brought out in Mr. Mulgrew's testimony, when you think about the nature of this distress situation which was originally alleged in some trucker's petition: the Commission did not recommend this legislation. Mr. Mulgrew testified that he had 200 experts in rate matters in his office. This Public Utilities Commission here is one that is regarded with the highest regard for technical competence in matters of rate adjustment. They have fine technical personnel.

The Committee on Legislation, who expunged out 150 years of experience, did not call for any study by its experts in the Commission, they did not call for a single witness from the Commission. The Commission did not recommend the legislation at all. It came full grown from the head of Jove. I respectfully submit that the burden of [fol. 1032] going forward with the evidence in this case was not met at all.

Now, there is another aspect that was intimated in the record and it has become important in the light of the appearance of Mr. Gordon as amicus curiae for the Manufacturers Association; that is, this question of a burden of government shipments on commercial traffic. There isn't one iota of evidence in the record hat such a burden exists. We bring out and cite, and it's an official publication available to all concerned, the only published study ever made by any competent statisticians to determine this thesis, and this thesis has been brought forward quite a bit, because there is money involved here, and the thing has reached the legislative forum, as it did here. Those studies show that the government shipments are 13 per cent higher than the commercial shipments.

Now, those studies are made by the Bureau of Statistics of the ICC. They are the best statisticians available. If anyone wanted to dispute them, why, they could have disputed it, but there isn't one scintilla of evidence to dispute that thesis. The only evidence which was just the opposite from what the thesis is, just a bare assertion, and Mr. Broz, who testified for the Air Force, he also brought out that he had made his study, and in his evidence he testified that his studies showed that the commercial shipments were lower on the average than the government's shipments.

[fol. 1033] Now, there are many reasons for that. As was brought out by all the witnesses, if the shipment is not one that involves a great deal of volume, then they will ship it at the class rate, they will have to do it fast. So you have a great deal of government traffic in its irregular pattern that is going at higher than the class rates all the time. That is particularly true of the Air Force where time is of the absolute quintessence, and so you have generally, overall, this situation in which government traffic moves at a higher rate than the commercial traffic.

So just to the contrary from the assertion that it's a burden on the commercial traffic, we would think that it would tend to lower the going rate for commercial traffic. There are several reasons for that, and I am not sure that we developed it completely in the record, but it's almost implicit. Frequently military shipments fit into an overall operation. That is, 100, 50 or 20 carriers who are involved here, they are in commercial traffic as well, and the great problem of back haul, and all that, tends to make their operations more economical when they can fit into this irregular pattern of the government traffic; and that's, under good traffic management, what they try to do.

Now there is another aspect of the matter when you think about it from the standpoint of the situations of California as a whole. It was impossible to develop com-

[fol. 1034] pletely here,—it would have been probably not worthwhile, although we tried to do it to some degree in studies—just how much would the increased cost be that results from these factors which were so clearly demonstrated in the record?

General Lasher testified it would be substantial. Mr. Broz, in his testimony, after stating that in his studies it showed that the Air Force traffic was generally higher than commercial traffic, said there would be an increase of approximately 27 per cent if we have to go under this system. Now, as was brought out in the evidence—happened to be brought out on cross-examination of Mr. Mulgrew—the total amount spent for movement from one point into California to another point was $20,000,000.

Now, the Air Force figures probably are conservative, because they have a higher rate to begin with. That would make an increase between points in California of approximately $5,000,000 per annum in the transportation bill of the government, and that's a very conservative figure indeed. $5,000,000 divided between 50 to a hundred people —well, that's not the particular aspect of the matter, but there would be no increased cost for doing the same thing that is being done now.

Well, California is probably the most important state as far as military shipments are concerned in the United States, and it has the highest type of traffic because it has [fol. 1035] all this Air Force traffic. Nonetheless, there is a tremendous amount of shipment in Texas and all throughout the United States there is a tremendous amount of shipment. As brought out in the brief and as a matter of record, this matter is up in at least six states, and from its history it would come up over and over again. If you consider the increased cost of this type of regulation, if it were put in in 45 states, you would have a tremendously increased item on the defense budget. That is in time of relative quiet—not relative quiet; Mr. Phelps will chide me for saying that this is a time of crisis, saying we are raising all kinds of unfounded fears and things of that sort. But a lot of people realize, a man like Churchill, and others with authority to read the signs of the times, say that we might be standing at Armageddon. Who can tell? There is no more critical time, probably, that we have been in.

General Lasher testified that in time of war the transportation budget would be increased to four billion dollars. Well, expand that cost under the relative ratios we have here. Any increased cost of that sort is going to eventually

have to be borne by the taxpayers, including the taxpayers of California.

Now, the next item. This would increase the taxes of the citizens for 50 or 100 people who would get $5,000,000.

It would change the pattern of traffic in many states. [fol. 1036] You take the Sierra Depot. They would route it—one railroad goes out of there interstate and the other goes intrastate; the Southern Pacific, inter, and the West-rn Pacific, intra. Naturally you would prefer the Southern Pacific if you would get a less rate. The truck routes come down to the south in the same way. The similar situation is in the south of California where you are going down to these air bases and dip over into Mexico. And Texas is another state where the situation would be even more exaggerated.

Then lastly this: —we have gone over it so much that I cringe almost to repeat this—the fact that the interference here would be so drastic and widespread, brought out by General Lasher, Colonel Hall and others, there might have to be some relocation or refunctioning of the depot system in order that they would be free and untrammeled on this departmentalized regulation within these geographic areas that have no real relation to the logistical problems involved.

Now, in that connection I think there is no better illustration than Sharpe General Depot. Sharpe is a depot that you would call a housekeeping depot. It doesn't keep ordnance and matters of that sort; have great stores of food, they have medicine, they have engineering equipment, and cots, tents, clothing—it's a big housekeeping unit. Now, as far as the supply of the troops is concerned and [fol. 1037] the sending of materiel to the Oakland Terminal here for shipment overseas, as Colonel Hall testified, they could all be very well done from back in the Ogden Depot. Transit time is not so important in that function.

But Sharpe is maintained there, and the federal government—it hasn't been developed, many reasons for the maintenance of Sharpe. You remember Colonel Hall's testimony of the mission of Sharpe. First, earthquake; second, fire; third, flood; and then enemy attack. Just while this proceeding was going on, as he testified, the flood

areas in the Feather River Canyon, Sharpe sent out their engineering equipment, sandbags, clothes, food and everything else. Can't help but read any newspaper, particularly yesterday, the anniversary of the earthquake here, and the great disaster, and the famous seismologist from the University of California says that the burden of California is having the mountains so near the sea, which creates a continuous strain.

Well, these installations here, which are operating—and a particular one like Sharpe, medical supplies and housekeeping, they are there for that purpose and declared so, and the evidence here shows it.

Now, transportation takes place in the sporadic way from one of those operations, the federal government pays the bill, as Colonel Hall testified, in the recent floods. If San Francisco would ever happen to have another earth-
[fol. 1038] quake, it would be Sharpe that would send the material; it would be Ord. Reading the history of the anniversa-y and you see that the Navy was over here the very morning, some captain on a destroyer there—read his remembrance of the thing just yesterday. The federal government is not going to shirk that responsibility and they are not going to curtail that kind of operation. But there would be that tendency in some of the places to perform the functions elsewhere.

As Mr. Pistor testified, the Red River Arsenal in Texas, it doesn't have a mission like Sharpe; it could be easily moved a few miles and there you would no longer have the problem.

Now, I take it that that in substance is the government's position on the facts.

The questions of law involved are set forth, and as the Court says, it would rather not have that.

I might just say in closing, so that I won't take any more of the Court's time, that we see no law that controls this situation. It's one of first impression. It's one of the state impinging on the most vital of vital powers. If there is any intimation in their authorities as to what the criteria would be here of what the great judges of our country would think, that would be that dictum that we called to the attention of the Court previously—called to the Court's

attention in our brief, by Marshall in that case in which [fol. 1039] he seemed to raise a rhetorical question.

Now, I like the English reports where they have the colloquy between counsel and court and it is set up by some student reporter, or something of that sort. The early Supreme Court's opinions did not have that, but there is some evidence there was some colloquy between counsel during the argument in that case, and Justice Marshall ended up by saying: "Can the states regulate the procurement of the goods or the transportation of the government?" Says, "We haven't heard that answered in the affirmative."

Now, there are a lot of implications to that. I take it that there must have been some colloquy there the first time they were working out the proposition, the supremacy of the United States in the areas within its powers.

Then that same dictum in another case, in Johnson against Bell, Justice Holmes, again quoting that: "Can a state regulate the transportation; we've never heard that answered in the affirmative." And I take the implication there was a point of departure. I think that this case, projected in its historical setting, is one of first impression, that that dictum there is significant. Between them Justice Marshall and Justice Holmes stretched from 1760 something to 1935, over four-fifths of the nation's history. But that particular quotation that arose out there some time in the past out of this colloquy, the first man, Marshall—he [fol. 1040] had been at Valley Forge, Holmes had been in the field—and they had probably watched for the wagon trains, and that's what we are trying to take.

Judge Lemmon: Take a five minute recess.

(Short recess.)

Judge Lemmon: You may proceed.

Mr. Phelps: May it please the Court, with Your Honors' permission, Judge McKeage and I should like to divide the time allotted to us; I should like to take about 40 minutes, and Judge McKeage about 20.

Judge Lemmon: That is satisfactory.

ARGUMENT BY MR. PHELPS ON BEHALF OF DEFENDANT

Mr. Phelps: At this time I should like to resubmit and reurge to the Court all the grounds and arguments we have in our motion to dismiss and also contained in our motion to dismiss the action which I advanced at the close of the plaintiff's case. At that time we took the position at the close of plaintiff's case that the plaintiff had not made out a prima facie case.

Today I should like to take the position and urge upon the Court, after the evidence has been heard from both parties, that the government has failed to establish by a preponderance of the evidence that the California regulation will probably result in an unreasonable interference and impeding of the exercise of the sovereign powers of the federal government.

[fol. 1041] The government called twelve witnesses, two each of the Armed Services, two representatives of the railroads, and General Lasher of the Department of Defense, and Mr. Brown, an attorney. It is very significant, it seems to me, Your Honors, that none of these gentlemen was on a policy-making level, although it has been said repeatedly by counsel that it is in this proceeding that the government is staking all of its case.

A large part of the testimony of the witnesses that were called consisted of descriptive comments of various kinds, referring to the kinds of government property that are transported, and how transportation for it is procured and how it functions. A great deal was said about class rates, about commodity rates, about FAK rates and about negotiated rates; about points of origin, points of destination, and the kinds of property that are transported.

But I should like to submit, Your Honors, that there is a glaring deficiency in the proof adduced by the plaintiff, and the deficiency is as I have previously suggested, a failure to produce before this court a statistical summary of the consists of this government traffic. If you examine the complaint you will find repeated allegations referring to military traffic, referring to shipments of government property.

I submit, Your Honors, that it was incumbent upon the [fol. 1042] plaintiff to produce a statistical summary to

show types of commodity in this government traffic, to show the points of origin, the points of destination, the percentage of traffic it moved under class rates, the percentage that moved under commodity rates, the percentage that moved under these FAK rates, the percentage that moved under rates negotiated before the movement took place, the percentage of traffic that moved under rates negotiated after the move took place. Those were all covered in the testimony of the witnesses without any statis-ical data to support the generalized conclusions which they expressed.

The result is now, Your Honors, that the record doesn't show, we are utterly without any knowledge as to what are these percentages that I have referred to. Of course, it goes without saying there is no burden on the defendant to show those things.

Counsel has indicated that he felt he would be leading this court into a collateral issue, be a waste of time. Mr. Broz, however, indicated that he had made such studies, but they were not produced. And I think we are entitled to infer that had they been produced they would have been adverse to the allegations contained in the complaint.

Now, instead of producing this statistical summary, which I submit was essential, many of the government witnesses gave what they called representative examples of [fol. 1013] government shipments, picked at random, they said.

Now, I am going to speak frankly, Your Honors, about a number of these witnesses' testimony. But first I would want to say that I have the greatest respect and regard for the sense of duty and loyalty of our professional officers. But I would like to suggest that when that sense of duty and loyalty is too intense it has a way of beclouding the vision and destroying the objectivity which these gentlemen might otherwise have.

I am going to give some examples later on of the lack of objectivity into which these professional officers were betrayed by their zeal.

Now, I have collected, Your Honors, all—I believe all—I have tried to make it all—all of the examples in a summary form which the witnesses for the government offered. And I am going to show later on that they are not repre-

sentative, that they were not picked at random, but on the contrary were obviously deliberately hand picked for the purpose of proving a particular point.

Most of the government's witnesses were permitted, over my objection, to express their opinions upon the effect of the state regulation. Together they stated a number of reasons why they thought state regulation would impede and interfere with the exercise of the government's sovereign powers and with the transportation of government property.

[fol. 1044] Now, I would like to recapitulate these reasons. I have tried to summarize them. The first and most outstanding one was the need to preserve security on certain shipments of government property.

Second, there was the alleged increased cost to the government under regulation.

Three, there was a reference to alleged delay in transpor-tion of government property.

Now, there was some further less well-defined reasons that were offered. It was said that it was difficult to distinguish between interstate and intrastate traffic, that government traffic is different from commercial traffic, and it was said that the present system is a good system.

Finally, refuge was taken by a number of witnesses, as well as counsel, in the proposition that it's the mere existence of state power, the mere need of going before the Commission that is objectionable, entirely apart from the probable consequences and defects of the regulation, the mere existence of the power was distasteful.

Now, before I comment on each of these grounds in turn, I would like to make certain preliminary observations. I should like to emphasize the importance of distinguishing between carload and truckload shipments on the one hand and less than carload and truckload shipments on the other hand. A number of the plaintiff's witnesses made it very [fol. 1045] clear that it was the large volume moves with which they were concerned, that it was those moves for which they needed special rates, that the small shipments of less than carload, less than truckload lots now moved at class rates established for commercial traffic, and presum-

ably they would continue to move at those rates under regulation.

The small shipments, therefore, Your Honors, I submit, present no problem. But that's not to say that the small shipments of lcl-ltl are a negligible factor. On the contrary, the government's evidence showed that there is a very large number of ltl-lcl shipments in class rates. I refer particularly to the testimony of the witness Mr. Broz where he said that in November 1955 out of 6,000 bills of lading all but 450 were for lcl-ltl lots.

Now this, incidentally, Your Honors, is a very good example of the need for a statistical summary here. Here there is evidence of a substantial but unknown quantity of traffic that will not be affected by state regulations at all.

There is another important distinction that should be observed, and that is the distinction between urgent moves that must take place before a rate can be established and those moves that can be anticipated or planned in advance and where time is not of the essence.

Now, in the former case it is obvious that it is advantage-[fol. 1046] ous to the government to be able to negotiate a rate after the move has begun, and then to have the rate made effective retroactively. In the latter case, however, where time is not important, the rate can be negotiated more or less leisurely, necessary approval of the regulatory body could be obtained before the move takes place.

Now, I should like to take up in detail the grounds of the government's objections to the state regulation.

First, security. I don't believe, Your Honors, there is a person in this room that does not recognize the need for preserving the security of some government shipments. That need is recognized by the Interstate Commerce Commission in its report, by the Weeks Committee, by the Hoover Committee, it was recognized by Mr. Mulgrew and by Judge McKeage. The representation by Mr. Mulgrew made to this court and the stipulation which Judge McKeage made to this court to the same effect, namely, that a blanket exemption—they would recommend that a blanket exemption be given to security traffic—that ought to put an end to that phase of the problem.

They also said they would recommend that no hearing should be necessary. This court should presume, I submit, that the Commission would act reasonably in that matter, and certainly should presume that the Commission would have no desire to undermine the nation's security. I shall [fol. 1047] say no more about security.

The second factor is that of increased cost. This increased cost rests upon a number of grounds. First, it was said that the rates established by the Commission for commercial traffic will produce higher charges, that there is no FAK rate available, or there would be none available under regulation, that there would be no commodity rate available, that they would have no retroactive effect for rates established after moves had commenced, that there would be a need for more personnel to classify and rate shipments under the Commission-established tariffs. And finally, that there would be no transit facilities, or at least that was suggested.

Now, let me emphasize in the first place that the Supreme Court of the United States has said that the mere fact of increased cost to the federal government is not a reason for striking down state legislation. But in the second place, the opinion of the government witnesses that regulation will result in greatly increased cost to the federal government needs to be examined with very great care. In this summary that I have distributed, Your Honors, I have grouped in group 4 on page 3 those examples given by the government witnesses to show how transportation charges under the rates established by the Commission would produce greater charges than are presently paid.

[fol. 1048] It clearly appears from this summary that most of these moves were volume moves, and I think probably they all were. In most cases, also, it clearly appears that the comparison was made between rates being enjoyed under special rate quotations on the one hand versus the rates and charges that would result from an application of the presently effective and established PUC rates on the other hand.

But it should be remembered, Your Honors, that the rates presently established by the Commission were established without any regard whatever to government traffic,

for the simple reason that heretofore government traffic had never been regulated. There was no need for tailoring any rates to suit government traffic, because it was unnecessary. It shouldn't be surprising, therefore, Your Honors, that if you compare the charges calculated under the present PUC rates versus those calculated under special rate quotations especially tailored to government needs, that you will find some sharp differentials.

But it's not fair to make that kind of comparison, Your Honors. Mr. Mulgrew said he knew of no reason whatever why such special rates could not be established for the government in proper circumstances, that it could be done without a hearing, that it could be done expeditiously, and that in appropriate cases, furthermore—and this is very important—the rates could be made effective retroactively, unlike commercial shipments.

[fol. 1049] Now, referring once more to these examples in group 4. I submit, Your Honors, there is no reason whatever why a special commodity rate couldn't have been authorized for the shipments described in examples 4, 6, 7 and 11. Those were volume moves, and Mr. Mulgrew indicated plainly that there will be numerous circumstances where special commodity rates would be appropriate and that he would recommend them. It would the application of a class rate.

Now, all the other examples in group 4 there, Your Honors, were mixed shipments, and presumably an FAK rate was enjoyed. Now, I purposely refrained from asking Mr. Mulgrew, and I assume he probably refrained from offering any comment about what he would recommend with respect to FAK rates, and the reason is this: that there is abundant evidence in this record, and elsewhere, that the FAK rates now being applied in California are unreasonably depressed and are being used for wholly unjustifiable purposes.

Now, that doesn't mean that an FAK rate would never be appropriate under any circumstance. It may well be that they are appropriate for certain kinds of circumstances. But the Commission, I'm sure, will want to have a good hard look at some of these FAK rates, and I'd simply like to recall to Your Honors the testimony of the witness

Loretz who was intimately familiar with the history of FAK rates in California, and recall what he had to say [fol. 1050] about them as they were used in California.

First, he said when you establish an FAK rate, "you, in effect, throw the book out the window." By that he meant you ignore the experience of many, many years of rate making, the experience that dictates that different rates should apply on different kinds of commodities for sound rate making. He did say, however, that the FAK rate was all right for some types of goods, such as for an entire division of troops with their impedimenta. But he said the FAK rate in California has gone way beyond that, and that in California it has been used to obtain a sharply reduced rate for a type of commodity which otherwise would have paid a higher rate. He said it's not a question of balancing a load and avoiding a minute description of an entire shipment, but that the FAK rate has been abused in California to get a low rate on a type of commodity for which it is not suited. And he described how there had been a steady deterioration of those FAK rates, depressed below all of the commodity rates, and that he had never witnessed anything like it.

Naturally, the Commission, under those circumstances, would want to look hard at these FAK rates, but it may well be in the end they will be authorized and they can continue to serve a useful purpose.

Now again, Your Honors, we don't know how much traffic in California, government traffic, moves under FAK rates. [fol. 1051] And I submit that it's very important that we should know, that the burden was on the plaintiff to show how much traffic is moved under these FAK rates. All we know now is that it is substantial, but of an unknown percentage.

There has been a serious misapprehension, Your Honors, on the part of many of the government's witnesses with respect to what would happen in the event of a dissolution of this court's restraining order. A number of them said that immediately and automatically they would be thrown into the class rate structure.

Now, Your Honors, that simp' is not true. I refer you to the memorandum of points and authorities which we filed in support of our motion to dismiss for a detailed history

of why that's not true. Briefly it is this: At the present time there is outstanding and in effect that provision in Minimum Rate Tariff No. 2, namely, item 20, which grants, in effect, to all carriers an unlimited authority to deviate from the established rates for all Armed Forces traffic. That is presently outstanding and will remain outstanding until the final determination of this case and until the Commission further orders.

Now, Your Honors, it will take an affirmative action by the Commission to make the presently prevailing rate structure effective in California for government traffic. Now, I think we must assume, Your Honors, and presume that the [fol. 1052] Commission will act reasonably, that it will not want to cause a sudden dislocation, a sudden transition from low commodity and special rate conditions to a higher class rate before an opportunity has been had for negotiating appropriate rates.

Now, referring once more to these examples collected in group 4 on page 3 and 4. It's very significant, Your Honors, that out of the seven truck movements which show there, six of them were carried by one carrier, Allstate Transportation Company. Now, I should ask Your Honors to consider that fact in the light of the evidence of Mr. Broz that the Air Force used 60 to 80 different carriers in California, and in the light of the evidence of Mr. Loretz in his Exhibit J that Allstate Transportation Company has been the principal rate-cutter operating in California.

Now, can there be any doubt whatever, Your Honors, that the shipments described here in group 4 were handpicked for the purpose of showing in its most extreme form the differential between the special rate conditions and the rate that would be charged under the Commission-established rates? To say that those examples were picked at random is absurd.

There is one more observation that should be made before I leave these examples in group 4. May I remind Your Honors of Colonel Flanagan's testimony when he said, in substance, that in negotiating for a rate the Department of [fol. 1053] the Army considered 50 cents a truck mile as a level of earnings below which they would hesitate to go. In substance that testimony was 50 cents a mile was a rather

reasonable floor and they would scrutinize carefully any rate under that.

Now, in the light of that testimony, Your Honors, I ask Your Honors to consider some of the truck mile rates that show up in these examples in group 4, and some of the truck mile earnings that were accepted by Allstate Transportation Company as shown in those examples. There are a number of them that are substantially below 50 cents a truck mile, the lowest one of them being approximately 28 cents.

Now, Your Honors may say, "How does a carrier like that survive?" The answer is to be found in the peculiar circumstances that obtain in California as explained by Mr. Musgrew and briefly by Mr. Loretz. In California there are many thousands of truck operators. Many of them are one-man enterprises who are operated by men who either own one or more or a small number of trucks. Those men are easy prey for the more firmly established operators, and the temptation to contract with those marginal operators and have them perform the transportation, while the principal carrier, as he is called in California, obtains the rate, the temptation is overwhelming, and that is what has happened. These small operators will do anything for gas money. They have made a haul some distance away from [fol. 1054] their home base, they will perform a back haul for gas money. That is why Allstate Transportation Company has been able to quote these absurdly depressed rates.

Another reason given by a number of government witnesses why the cost of transportation would be increased was that it would take more personnel and a longer time to classify and rate shipments under the tariffs established by the group. An example was given by Lieutenant Commander Bengston and by Mr. McKinney, his assistant, and I have set that out on page 2 of my summary in group 3.

According to that example, it took 17 hours and 15 minutes to apply the PUC No. 2 classifications and ratings upon 550 pieces of freight, or an average, if you calculate it, an average of approximately two minutes for each piece. Now, I ask Your Honors to compare that result with the classification and rating times that are shown, for examples 1, 2 and 3, in group 4. I have made the calculations and I think you will find that for those shipments in group 4 the

average time for classifying and rating under PUC tariffs was slightly more than half a minute for each piece.

Now, a discrepancy like that, Your Honors, needs to be explained. And when confronted by it, the witness McKinney was obviously confused and offered contradictory testimony.

There is another example, Your Honors, another instance of an example offered by the government witnesses as a [fol. 1055] representative example that wasn't representative at all. This example of the 17 hour rating job clearly was hand picked, a test run was made. I don't know what was done to extend the time.

The other examples in group 4 were picked for the purpose of showing the differential in the rates. Both of them were considered and called by government witnesses as representative. Now, they can't have it both ways. If these examples in group 4 were representative, they show a very much less time for rating and classification than the example in group 3 indicates.

It is also interesting, too, Your Honors, that in this group 3 example on page 2 that that too was carried by Allstate Transportation Company and that the earnings there were approximately 39 cents a mile.

Before leaving these examples, Your Honors, I should like to comment on one further factor. There were four witnesses called by the government: General Lasher, Colonel Hall, Lieutenant Commander Bengston, and Mr. Stallings all of whom said in some form of words that subsistence items or food was one of the largest items shipped by the government in California. There isn't a single example here of the shipment of food. Mr. Stallings was quite frank to tell us when I asked him why he didn't show food. He said, "Well, I thought we should show those commodi- [fol. 1056] ties with respect to which the impact of regulations would be the most severe." Refreshing candor.

Another reason why costs were going to go up, as stated by government witnesses, had to do with this matter of transit. The testimony of Colonel Hall contained more comment upon that than any of the other witnesses. But it was quite obscure and quite vague and I have great difficulty, I confess, in knowing what to say about it. He

seemed to imply, however, that under regulation the privilege of transit would be lost and that somehow or other you were going to have to segregate in your storehouses and warehouses intrastate property from interstate property and you wouldn't have the transit privilege any more.

He was unable to say why such a segregation as that would have to be effectuated, and I must say I don't understand why, either. The fact is that the transit privileges are established in a number of the rail tariffs in California, as well as the trucking company, contrary to what Mr. McKinney said—perhaps it was Colonel Hall.

There is no mystery about transit. The whole thing i controlled by documents. You have a shipment of property coming in to a transit point of a given amount of tonnage. A shipment then goes out of the transit point to a particular destination. It doesn't have to be precisely the same items of property that came in, so long as it's prop- [fol. 1057] erty of a like kind and so long as you had registered an incoming movement of sufficient quantity to allow you to make the outbound move—all controlled by documents, no physical segregation of property inside the warehouses with respect to points of origin is necessary.

Now, there was alleged to be delays that were going to follow from government regulation. There is some inconsistency : nong the witnesses as to where and how this delay was going to occur. With some of them the delay was going to occur in the classifying and rating under the PUC tariffs; for others the delay consisted in the necessity of going to the Commission from time to time; and in the third example, the delay took place on the shipping floor.

Some of these witnesses in an excess of zeal said on their direct examination that shipments could not move until they had been classified and rated under the PUC tariffs and the regulation. Now, that is an extraordinary thing to say, Your Honors. Mr. Bengston and Mr. McKinney both went that far, however. On cross-examination, however, they did admit that in no case would an urgent shipment be allowed to wait until the rating had been completed. Colonel Hall said that the shipment would have to wait until you could come before the Commission to get a rate established.

Those are good examples, Your Honors, of this beclouding of vision and lack of objectivity that I referred to earlier. [fol. 1058] Now I must hurry along, I see. There is not much I can say about this alleged difficulty of segregating intrastate versus interstate property. It was never made clear by the government witnesses why such segregation was necessary, and I don't understand why either.

A number of the witnesses said the present system was a good one. On cross-examination, however, they admitted that it had a number of deficiencies that needed to be corrected. I refer Your Honors now—we offered in evidence certain exhibits containing reports of various informed bodies: Exhibit C of the Hoover Committee, and I recommend that Your Honors read pages 4, 5, 95 and 96; on Exhibit D, pages 31 through 35, inclusive, and pages 98 through 100, inclusive; Exhibit E, pages 19 and 20; Exhibit F, pages 31 through 33, inclusive; Exhibits G and H are letters from the Comptroller General establishing his view that there is a duty upon procurement officers to obtain the most advantageous rate and that in his opinion it was not feasible for those procuring officers to attempt to guarantee or insure economic stability of the carriers involved.

I should say, Your Honors, we are not offering these as representing in their entirety the views of the defendant; we offer them to show that the views of the plaintiff's witnesses that there are no defects in the present system are open to question.

[fol. 1059] I should like to comment, if I can briefly, upon some of the individual witnesses a little further. General Lasher finally said the crux of it is the very existence of the power, is what we find objectionable, and in the final analysis, Your Honors, that is what the government's case is, and that is the issue here. Does the mere existence of the power without regard to the probable consequences impede or interfere with the federal government's sovereign powers? Colonel Hall said, "Perhaps I was just looking at the worst possible picture."

Mr. Pistor came from Texas to testify as a representative of the railroads. He first said he had no knowledge of

conditions in California and felt it was unnecessary to state any. He also said as one of his reasons for objecting to the regulation was that the packing requirements would be different. Now, I found later on, Your Honors, and I ask Your Honors to examine the plaintiff's Exhibits 3 through 6—those are the bills of lading—and you will find stamped on the face of them, which I hadn't noticed until recently, a stamp in the form of certificate by somebody that this shipment had been packed pursuant to the requirements of the Interstate Commerce Commission.

Apparently they feel, among the government shipping organizations, that they must or ought to conform to the present ICC regulations with respect to packing.

[fol. 1060] Colonel Chambers admitted that he was no transportation expert. Colonel Eastham was able to offer just some epithets. He said that regulation would produce a lopsided logistical picture and a hodgepodge, without further elaboration.

Mr. Stallings was candid enough, as I say, to admit that he had hand picked some of his examples.

Mr. Broz, who perhaps was the most fluent and articulate of the government witnesses, it appeared on cross-examination that he had selected three examples of shipments and it turned out that all three of them had been carried by Allstate Transportation Company. Mr. Broz also indicated he disagreed with the Hoover Committee and the Weeks Committee and the Interstate Commerce Commission.

Now, I am going to hurry along, Your Honors. My time is almost up. I should like to say this before I close: If we can put security matters to one side, as I submit we should, in the light of the representations that have been made, and if we accept Mr. Mulgrew's declaration of what he would recommend and Judge McKeage's stipulation, here is what we will have:

Security matters generally exempted; commodity rates can be established where appropriate, without a hearing and expeditiously, and, very important, they can be made effective retroactive. That's very important, Your Honors.

[fol. 1061] Mr. Mulgrew said he saw no reason whatever why that could not be done.

Now, if all those things are true, Your Honors, have we not resolved all of the objections to regulation expressed by these government witnesses, the only possible exception being this FAK rate which they cling to, and with good reason from their point of view, because it's cheap. The only result, I submit, Your Honors, that might be adverse to the Government under these circumstances is they might have to pay—might, I say advisedly, we don't know—might have to pay someone more in the event the Commission should decide that some of these presently established FAK rates are unreasonably low.

Thank you very much.

Judge Lemmon: Recess until 2 o'clock.

(Whereupon an adjournment was taken until 2 p. m. this date.)

[fol. 1062] April 19, 1956, 2:00 o'clock P. M.

ARGUMENT BY JUDGE MCKEAGE ON BEHALF OF DEFENDANT

Judge McKeage: May it please the Court, I am fully conscious of the desire of the Court that we do not argue the law. I do not intend to do so, Your Honors, but in light of the fact that the evidence is now in I should like to ask the Court to bear with me to cite about four decisions of the Supreme Court of the United States that are applicable, at least in my view, with regard to the factual situation. I will not undertake to argue the cases whatsoever.

Now that the evidence is in and applying to the evidence in the case, I do wish to stress this fundamental rule of constitutional law relating to statutory construction which runs like this: Unless a statute is unconstitutional on its face a court must presume that the officials charged with the execution of such statute will execute it in a manner not offensive to the Federal Constitution, the burden being upon the party assailing the statute to show the contrary.

We contend that under the evidence that burden has not been carried.

Furthermore, a court must assume the existence of any reasonable state of facts which will sustain the statute. [fol. 1063] We contend that reasonable state of facts exists.

Furthermore, if two conclusions may reasonably be drawn from the facts, one that the statute is unconstitutional and the other view that it is constitutional, a court is bound to adopt the latter conclusion.

Every presumption must be indulged in support of the validity of the statute and only clear and demonstrated usurpation will authorize judicial interference with the legislative action.

I cite these cases: National Fertilizer Association vs. Bradley. That was by a three-judge United States District Court for the Western District of North Carolina, 18 Federal Supplement 263 at page 277, and that was examined by the Supreme Court of the United States, 301 U. S. 178, 81 Law Ed. 910.

Another case: National Labor Relations Board vs. Jones & Laughlin Steel Corporation, 301 U. S. 130, 81 Law Ed. 893, 908.

Alabama State Federation of Labor vs. McAdory, 325 U. S. 405 at pages 465-6, 89 Law Ed. 1725, 1737, 1739.

Now, the statement that I have just made, Your Honors, I believe to be very conservative in light of this language from the McAdory case which I have just cited. At page 465, 466 of the United States Reports the court says this:

> "When a statute is assailed as unconstitutional we [fol. 1064] are bound to assume the existence of any state of facts which would sustain the statute in whole or in part."

Now, apparently the plaintiff does not seriously contend that the assailed statute is unconstitutional on its face, otherwise all of this evidence would not have been adduced to show that its operation will work an unconstitutional burden upon the sovereignty of the United States.

I wish to refer to the testimony of two witnesses, both from the railroads. Mr. Pistor testified with regard to the alleged rigors of the regularity statutes of the state of Texas. Now, his testimony shows, if laid cheek by jowl

with the statute in California, that the statutes are not alike at all. We take the position that his testimony is immaterial because it is not addressed to the same set of circumstances and facts here presented.

The other railroad witness, Mr. Hill, like Mr. Pistor, both spoke about the alleged rigors of regulation. I might say, Your Honors, that of course all regulation, like all government, naturally represents restraint upon all of us, but that is no argument against it. In other words, if the arguments here made about these restraints were given heed by government, we would have no regulation at all, because those same arguments are always made against any type of regulation.

[fol. 1065] Another point that I desire to make is this: I would assume from the evidence in the case that the Attorney General makes no contention with regard to what we might call civilian government traffic, traffic between the civilian branches of the government, and I would assume not in regard to ordinary traffic between military installations with regard to, say, food and clothing and the like unless there be some particular emergency.

The witness McKinney, Stallings and Broz, their testimony—I wish to say this about it: Their testimony, in effect, was cumulative with regard to the testimony of their military superiors, and therefore I do not attach any distinction; it was merely cumulative.

So I would make this point, that in my humble opinion the important testimony on behalf of the plaintiff—of course, we do not concede its validity to support what they contend—was given by the officers of the Armed Services of the United States. Of course, I can sympathize to some extent with the claimed annoyance that regulation imposes. Being in that business I know that it is annoying. No one doubts that, but as a matter of public policy, it has been decided by government that the annoyance is more than overborne by the public interest which it protects.

So I would say this: that the plaintiff speaks of being annoyed. I might point out that the people of California [fol. 1066] might contend that they are annoyed by being brought here, and I say most respectfully, before this court to defend a statute which they enacted, and I would

like to illustrate a point on that. Sometimes we forget the side of the other person in litigation. In the United Airlines case, which has been discussed here and cited in our brief, an incident happened before the Supreme Court of the United States which, I think, illustrates my point.

There the government and the United Airlines were complaining to the Supreme Court about the impingement on their rights of the asserted action of the people of the State of California by their statute. In the midst of their argument Mr. Justice Minton asked this question of counsel. He said, "What are you doing to them?"—referring to the Commission and its counsel—and there was a pause, and there was no answer. Then he said this, "You have dragged the Commission into the federal courts consuming time and incurring expense. Isn't the Commission the party who really has a complaint coming?"

Now, I cite that to show there may be two points of view here with regard to the annoyance and restraint or interference that the plaintiff claims as being imposed upon him. It may well be that there might be an honest difference of opinion. Maybe we are the ones who are being impinged upon.

[fol. 1067] Now, I wish to point out this: I say this in no sense of criticism about the officers from the Armed Services, because I would be the last to say so. For five years I was a member of the United States regular army, and for some 16 years I was an officer in the Adjutant General's Department, Officers' Reserve Corps, but I must say that military officers are not the best people qualified to give an opinion with regard to matters of this kind, matters of high government policy.

Now, I think it is significant that we did not have here the Secretary of Defense; we did not have a Secretary of either service, Army, Navy, or the Air Corps; we did not have an Assistant Secretary, and we have here reports which I have not time, within the time allotted to me, to read from, but I will call attention to the pages, the court's attention to it.

The Hoover Commission report at page XI, also page 61, 64, 66, where it is pointed out the very thing that I am

making, that the people who make policy for the United States of America would necessarily be the Secretary of Defense, or some of those civilian officials, or the Interstate Commerce Commission or others who are agents of the Congress.

Now, they did not appear here. So I do say in all sincerity that the testimony of these officers from the Armed Services is the kind of testimony that you would [fol. 1068] expect them to give. It is their nature, it is their training. They are not trained in what we might call the democratic process; that is just not part and parcel of a military organization. So I most respectfully say that their training with respect to a matter of this kind—and surely the job that they are given to do they would do it best by of course giving their time, as the Hoover report says, to their professional duties rather than this type of matter which normally would be handled by civilians.

I wish to point out further, Your Honors, and that is this, that this matter of national security, the matter of whether or not government traffic should be given preference,—those are legislative-political matters. And I will cite a decision of the Supreme Court which lays down that usual rule with regard to matters of that kind: Chicago and Southern Airlines vs. Waterman Steamship Corporation, 333 U. S. 103, at page 111, pointing out that courts will not evaluate matters of this kind, they being matters which normally the Executive Branch of the government of the Legislative Branch of the government would attend to.

So I say this: that the testimony here of these military officers and what we find in these reports to the Congress of the United States, what we find in the Weeks report—those matters just simply impeach this testimony, and we have a right, of course, to point that out.

[fol. 1069] I wish to point this out, too, and I don't mean to be an alarmist at all. I am inclined to agree with the Attorney General that this is a most important case. I cannot go so far as to say that it's a case of first impression. We believe that there are plenty of decisions of the courts which can be used to solve this problem. But it is tremen-

dously important for this reason: that here you have the United States attempting, in a completely intrastate field —this is not a matter of where you are in a field of interstate or foreign commerce, or foreign affairs, matters of that kind, which, in some instances, with the tolerance of the Congress, the states may operate—but here you have a completely intrastate field, and the request here is that a statute in the field where it is admitted that the state has a right to legislate, the request is to strike this down and, too, without any implementing authority from the Congress of the United States.

As has been pointed out, that is a matter which courts should be most reluctant to enter where the legislative branch has not so entered.

My brother McConnell stated during the course of this case that this is not a stars and bars case. Well, speaking as one who comes from south of the Mason and Dixon line, I contend that this is not only a stars and bars case, at least to the people of the state of California, but that it [fol. 1070] is more than that, it is a stars and stripes case, according the way we understand the Federal Constitution.

Now, then, in closing, Your Honors, I wish to say this: We have here the testimony of the officers from the Armed Services in detail telling us how it is that they will be seriously interfered with if this statute is not stricken down as being an impingement upon federal sovereignty. They have selected instances where they seek to prove that that is the case. Well now, I would ask this court also to keep in mind these high principles, as I know this court will, upon which our dual system of government is based. Bear in mind the presumption of the validity of this statute in the constitutional history; all of those are matters of evidence of which this court must necessarily take judicial notice, and those matters should be placed in the scales of justice in this proceeding.

While I am painfully aware of the fact that the Supreme Court of the United States has held that in circumstances justifying it a statute of a sovereign state may be stricken down in the purely intrastate field. But we contend that that is an exercise of an awful power and that a court should approach it in the most judicial way, realizing that

it was the great compromise of our dual sovereignty that caused this nation to come into being, and for my part, Your Honors, I believe that those principles that were then [fol. 1071] honored are just as important today. I do not believe that they have been eroded by time or diluted in any way.

So we would say this to this court: that it should place in the scales of constitutional government this claim, asserted by the witnesses from the Armed Services, that military necessity will not permit the exercise by the state of California of any regulatory authority over transportation rates applicable to military traffic, and weigh such claim against the fundamental principles of our system of government, the historical underlying spirit which conceives that system, and which spirit I sincerely believe emanates from that governmental system today.

And when that has been done I most respectfully assert that this argument in terrorem put forward by the witnesses for the plaintiff will constitute its own contention in the face of those constitutional principles upon which the defendant rests the case.

Judge Lemmon: Mr. Poe, it is your turn to carry the torch.

Argument By Mr. Poe

Mr. Poe: May it please the Court, my original appearance in this case was on a motion to intervene on behalf of a number of highway common carriers. In denying the motion the court did so without prejudice to my subsequent appearance as a friend of the court. It therefore seems [fol. 1072] proper under the circumstances that I should identify a little more fully the interests that I represent in my appearance here before this court.

I am the general attorney for the California Trucking Associations, the state organization of truck carriers in California, which in turn is affiliated with a national organization known as the American Trucking Associations, which was mentioned during the cross-examination of General Lasher.

The carriers on whose behalf the petition to intervene was filed are highway common carriers operating under

certificates of public convenience and necessity issued by the California Commission and are representative of those common carriers who are directly affected by the statute that is under attack by the government here.

Now, lest the impression be left that the subject matter of this case involves some controversy between the railroads and trucks, I want to deny that emphatically. It will be revealing to the Court to know that the amendment to Section 530 of the Public Utilities Code, which has been placed in question by the government in this case, was passed by the California Legislature at its last session in both houses unanimously. I am sure that the members of this court are well enough aware of the processes of the California Legislature to know that that means but one [fol. 1073] thing: that there was no controversy between substantial interests in the state.

Judge Lemmon: We can take notice that one of the members of this court has been so advised.

Mr. Poe: But there is no difference between the railroads and the trucks in California on this question. Evidently that was not the case in Texas, or is not the case, because the Texas case to which counsel for the government has referred on various occasions was filed by the Texas and Pacific Railway Company and others against the Texas Railroad Commission. There the motor carriers intervened in support of the Railroad Commission of Texas.

It was from that rail carrier, Texas and Pacific Railway Company, that the witness Pistor was brought by the government here to California to testify in this case rather than to present someone from a carrier operating within California.

Now, our position is in support of the defendant Public Utilities Commission. We believe that Section 530 of the Public Utilities Code, as amended in 1955, is valid and constitutional and that it is sound legislation. We subscribe to the principle that has been adopted by the state and by the nation that the regulation of public transportation is essential to the wellbeing of the economy of the nation and that the objectives of that regulation are to assure the public of a dependable transportation system with service [fol. 1074] available to all at reasonable rates without dis-

crimination. We further believe that such regulation has been impaired in California by reason of a lack of power in the Public Utilities Commission to deal with the rates applicable on transportation by common carriers for the United States Government, the United States Government undoubtedly the largest single shipper in the state of California.

We agree with General Lasher that a sound strong common carrier base is good for the country and that it is undesirable that carriers should be allowed to beat down rates, and those are his words, to beat down rates on government traffic to a point where they become a burden on other traffic.

Counsel for the government has asked this court to weigh the advantages to the state of California resulting from the statute against the inconveniences or burdens to the federal government. I don't quite believe I agree with that as a test for the constitutionality of the statute; I would prefer to adhere to the principle announced by the Supreme Court in the Penn Dairies case that if the statute is sought to be within the police power of the state, that is a statute which is proper in the first instance, that it should not be held invalid unless it conflicts clearly with the congressional legislation or with congressional intent. [fol. 1075] But in any event, an inquiry into the background, against which this statute as passed in 1955 should be viewed, is surely pertinent to this case. The question naturally arises in the mind of anyone thinking of this subject: Why hasn't this question arisen before? Why is it here before this court after so many years of exemption of government traffic from regulation by states and the federal government? I don't think that's difficult to understand when we consider the fact that military traffic, military activity until recent years, and very recent years, has been rather insignificant in our economy, except in wartime. During peacetime we have traditionally shrunk our military establishment to the minimum, and therefore we have not been concerned, either at a state level or the national level, with the effect of unregulated transportation rates as applied to military traffic.

Now, the last few years, particularly since the Korean activity has ended, we have accepted for the first time in the history of this country a large military establishment as a peacetime element in our economy. That has brought to the forefront this problem of transportation rates as well as, of course, many other problems that are attendant upon that system. It therefore seems not suprising, but natural, that we should become conscious of this gap in our regulatory system that has resulted from a big business, [fol. 1076] a $20,000,000 a year volume of business, according to counsel for the government, in California alone, that is unregulated as to transportation rates.

California has had a complete regulatory system of transportation rates. It has regulated not only common carriers, but the non-common carrier, or, as we call them here, permit carriers; the rates of all classes of carriers have been subject to regulation by the Public Utilities Commission, with this one exception of government traffic. That, of course, applies to both state and federal governments. But it has become suddenly, or within the last few years, very important.

Now, it is inevitable that the results of this gap in the regulatory scheme be made to show up, and they did show up, as is evident from the testimony of the witness Loretz. They showed up about the beginning of 1954 when the rates began to deteriorate as applied to traffic for the military services of the United States. At that time, or at the end of 1954, the matters came officially to the attention of the Public Utilities Commission, and in a proceeding brought before it, the decision of which is a part of Exhibit M in evidence in this case, the Commission found that the evidence before it supported a finding that certain permit carriers have driven rates for the handling of such shipments, that is, government shipments, to a depressed and [fol. 1077] unreasonable low level, thereby creating chaotic transportation conditions in the movement of such goods. Such depressed and unreasonably low rates for the government traffic are depressing the revenues of the carriers now and previously engaged in handling such traffic, and if continued will create a burden on other traffic.

The court does not need to accept that finding alone. There is evidence in this case which clearly supports that finding.

I need not reiterate the facts which Mr. Phelps has touched upon that disclosed that, but before mentioning those again I want to refer to what apparently was the avowed policy of the military services during this period, and still is the policy, with respect to the level of rates which they negotiate with carriers.

We find in the testimony of Colonel Flanagan, who was in charge of the negotiation of transportation rates for the Department of the Army, several statements which disclose that policy. At page 383 of the transcript Colonel Flanagan testified to the effect that all we are allowed to do by the Department of Defense policy is to seek a reasonable rate similar to what a commercial shipper would establish on his movements.

Again at page 390, approximately 90 per cent of our rates are made in comparison with a similar commodity [fol. 1078] that has similar characteristics. Again at 392, the best test of reasonableness is comparison with what is open to the commercial shipper on the same or similar commodities.

And so on, culminating with his statement at page 395, previously referred to by Mr. Phelps, that any time a quoted rate or negotiated rate by truck dropped below 50 cents per truck mile the Army took a close look at it because it was beginning to be on the verge of unreasonableness.

Now, in applying that test to the evidence in this case, as has been noted, we find rates as low as 30 cents, producing as low as 30 cents per truck mile. In the Exhibit J introduced through the testimony of Mr. Loretz, we find in examples cited by witnesses produced by the government several instances, particularly three that I recall in the case of the witness Broz, wherein truckload movements between Cheli Air Force Base at Maywood and McClelland Air Force Base near Sacramento, a distance by road at least approximately 400 miles, producing a total freight charge of $120, or approximately 30 cents per truck mile.

Now, by their own standards, by the military's own

standards, those rates have been driven down to a depressed, unreasonably low level.

Another comparison of the standards laid down by Colonel Flanagan may be found in the commodity rates which were illustrated by the witness Lane of the Commission's [fol. 1079] rate department in Exhibit L, typical rates, as he pointed out, taken from the commodity rate tariffs on file by the rail common carriers with the Public Utilities Commission, and in all instances those rates which are applicable to straight loads of heavy moving commodities, those rates are higher than the freight-all-kinds rates charged by some carriers and paid by the government military services, as disclosed by this case.

Mr. Lane testified that the samples of rates which he listed in Exhibit L were but representative and typical of hundreds and thousands, even, of rates published by the rail carriers in California, which furnish the basis of the commodity rates.

I have here for mere illustration the railroads' commodity tariff No. 300 from which most of these rates were taken by Mr. Lane, indicating, if you please, that when the government says California doesn't have commodity rates but has a rigid high class rate structure, which controls and would have to control the rates applicable to government traffic, if Section 530 is allow- to become and remain effective, I say that this denies that fact. There is nothing peculiar about government traffic that can't be susceptible of treatment through commodity rates as well as traffic that is moved by commercial shippers.

The shipments which have been illustrated by the govern- [fol. 1080] ment witnesses, and which have been collected by Mr. Phelps in the memorandum that I believe was distributed today, will, upon examination, be found to have moved between those centers of population between which the witness Mulgrew testified commercial traffic moves in regular channels. I don't think this court, composed of judges living in California, needs to have much evidence to convince them that the principal points between which commercial traffic moves in this state are the triangle formed by San Francisco, Sacramento and Stockton on the north, and the Los Angeles area, or extending on south to

San Diego on south, are along the major highways and rail lines along U. S. Highways 101 and 99.

Now, it's there that these shipments have moved, that the government has chosen to present here as typical, and there is no evidence in this record except with respect to, say, the Barstow Marine Corps Supply Depot and the ammunition depot at Herlong, California, and possibly a few other training points like Camp Irwin and 29 Palms out in the desert, there is no evidence except with respect to those few of any substantial movement of traffic in California for the military except along these same channels that commercial traffic moves, and when general statements are made by the witnesses or by counsel for the government that military traffic moves in opposite or different directions [fol. 1081] than commercial traffic, they are simply not talking about California.

Counsel for the government made a reference that I feel incumbent upon me to comment on at this point concerning the failure of truck carriers to testify in this case. Now, I don't know that the Public Utilities Commission had ever urged in this case that the financial condition of any individuals or groups of carriers in California was an issue in the case. I haven't heard of any, and I was a little surprised when counsel made the suggestion that the defendants should be put to any disadvantage because it had failed to call carriers to testify. I would consider it would have been improper if they had been called, because I fail to see that this case is one in which the financial condition of any individual carrier or any group of carriers would be in issue or would constitute pertinent evidence.

Judge Lemmon: He was balancing the convenience between the government and the other interests.

Mr. Poe: I appreciate that, Your Honor, but I think the balancing of convenience, if that is to be a test, is between the public, as represented by the government of the United States, and the military on the one hand, and the interests of the public in California, not one carrier or two carriers or any one number of carriers.

Judge Lemmon: The carriers are part of the public——

[fol. 1082] Mr. Poe: That's right.

Judge Lemmon: —and as part of the public should be very much concerned about this case.

Mr. Poe: That's right, and if a carrier is at a disadvantage in hauling government traffic he may withdraw from that traffic, but that hasn't solved the public's problem.

Judge Carter: I think he made that statement in connection with his argument that there was no showing of distress on the part of the operators.

Mr. Poe: Yes.

Judge Carter: Or no showing of distress in the trucking industry.

Mr. Poe: Yes.

Judge Carter: It's your position that the distress of the individual trucker would not be evidence of distress of an industry-wide nature?

Mr. Poe: Precisely; that it is the broad effect on the entire system of regulation as ultimately bearing upon the public interest that we are concerned with in regulation, not the welfare of one or two or ten or twenty or thirty carriers.

So much for that.

I would like now, if the Court please, to turn to a short analysis of the statute which was enacted by the Legislature in the face of this environment or atmosphere. This [fol. 1083] amendment to Section 530, of course, brought to an end the absolute exemption from regulation of rates by the Public Utilities Commission of common carrier charges on government traffic. It did that, but that isn't all that it did. The statute is entitled to deeper consideration than that alone, and I might say at this point that that's another difference between the situation in California and that Texas case.

If I understand the Texas case, all that is involved there is a determination by the Attorney General, suddenly, that the laws of Texas requiring adherence to tariffs of common carriers is applicable to traffic transported for the United States Government: That's it. No special treatment in the statute in Texas of government traffic.

That is not the case here. The California Legislature in the 1955 amendment eliminated the exemption, to be sure, but added that paragraph at the end of Section 530 reading:

> "The Commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

And then another sentence is added which makes it possible for these common carriers to meet the rates of any other [fol. 1084] carriers, whether a common carrier or what we call permitted carriers.

So we have a treatment by the Legislature of the specific problem that the government is concerned with in this case. It's a recognition by the Legislature of the fact that there is a peculiar problem with respect to military or government traffic. And instead of those absolute prohibitions against a common carrier ever charging a rate below its tariff's rates, as is the case with ordinary shippers, here we have the Legislature laying down a rule for the Commission to follow that all it needs to do is determine that under the circumstances, whatever those circumstances may be, the Commission may authorize the common carrier or common carriers to charge less than its tariff rates to the government to such extent and subject to such conditions as it may determine just and reasonable.

That, we believe, eliminates from this case all of the basis for the fears of the dire consequences that have been expressed by the witnesses for the government as to the results of this new statute.

It's not necessary that we consider whether it would be proper or valid for California to specify that they must charge the same rate to the government that they charge to all commercial or ordinary shippers. That isn't what the Legislature has said. So we have here a statute which does [fol. 1085] not prohibit common carrier rates, does not prohibit special rates for the military services. All the statute does is give to the Public Utilities Commission the power to deal with these abuses, if we should call them that, or at least practices that have developed in the performance of service for this single biggest shipper in California, the United States Government.

Counsel for the government had a good deal to say this morning about these complicating and confusing problems

that would be confronted by the military services if section 530 were to be allowed to be effective by this court: The necessity of classifying commodities, the necessity of adhering to this rigid class rate structure rather than the use of commodity or going rates, the intricate problem of determining the nature of traffic as between interstate and intrastate. All I think need be said about that line of argument is that those problems are not new, they are not peculiar to the military services; those are problems which have been dealt with by commercial shippers and carriers of commercial traffic over the years. They have been satisfied, or they have been met without any breakdown of our economy, and there is no reason to believe that they can't be dealt with in a reasonable manner if the government is required to adhere to the standards laid down by the Legislature in Section 530.

[fol. 1086] Now, in concluding, if the Court please, I would like to comment a little on the testimony of the government witnesses in endeavoring to give to this court the impression that the present system of procuring transportation services for the military is thoroughly satisfactory. Colonel Lasher, Colonel Flanagan, with most of the witnesses—General Lasher, Colonel Flanagan, every witness called by the government who was asked the question, expressed a satisfaction with the existing system.

From them the court would gather the impression that this act of the Legislature of California was entirely unnecessary, uncalled for, the system is virtually perfect. It is understandable that the military establishment should resist any curb on its freedom of action—that's perfectly natural. As Judge McKeage has referred to, the military has always tended to resent any civilian control of its activities.

But the facts don't support that position. This problem that California has been confronted with and which the Legislature has tried to deal with in a reasonable manner is not localized in California. Counsel for the government himself has mentioned to this court on several occasions that there are maybe a half a dozen other states that are coping with the problem right now.

Reports have been introduced in evidence in this case [fol. 1087] showing that there has been a great deal of criticism of the system at the federal level, the so-called Section 22 exemption from the Interstate Commerce Act has been under attack by the cabinet committee, the Hoover Commission, the Interstate Commerce Commission, and I think it's proper for me to call attention to the matter of public knowledge that there are at least three bills now pending in the Congress designed to amend Section 22.

This problem has come to the forefront at the state level and at the federal level within the last two years. It isn't something that has just developed because of some peculiar idea that someone in California has come up with. It is the result of that development of the volume of military business that has become a segment of our economy that can no longer be left unregulated insofar as transportation is concerned. This huge gap that I referred to earlier cannot be left open without serious consequences to our transportation system.

The California Legislature has dealt with it in a reasonable manner, provided a statute that will enable the Commission to accomplish the needed control of abuses with a very minimum of burden on the federal government or on the state government. The government chose not to allow the Commission to gain any experience in administering the statute, it chose to challenge it.

[fol. 1088] Judge Lemmon: Your time has expired.

Mr. Poe: I am sorry, and I have nothing further to add of any consequence.

Judge Lemmon: I think we allowed you, Mr. Gordon, fifteen minutes?

Mr. Gordon: Yes.

ARGUMENT BY MR. GORDON

Mr. Gordon: May it please the Court, appearing as amicus curiae on behalf of California Manufacturers' Association, I wish to address myself to the interest of the shippers in the problem which arises out of the proper method of regulation of rates pertaining to government traffic and its impact upon civilian traffic.

The California Manufacturers' Association participated actively in all of the proceedings before the California Commission preceding this case here, and felt that they would like to have their views presented to this court.

The Association that I represent, as indicated in our petition—we did not produce witnesses here because I think it would have been unnecessary and cumulative—is a large organization of manufacturers in California who receive and ship a great deal of freight.

Now, excepting that I feel that there is a principle here that's as old and as simple as any principle in our law pertaining to the sovereign right of the state to regulate [fol. 1089] public utilities.

Beginning with the early case of Smyth vs. Ames, which every student of law is familiar with, our Supreme Court has laid down and consistently followed the principle that a carrier whose property is dedicated to a public service is entitled to a fair return upon the fair value of that property. It is as axiomatic as the summation of two and two, or the substraction of two from four, that if, under that rule of law, which is the judicial test of the determination of the reasonableness of a rate, that it rates in one particular category or field are unduly depressed, the carrier is entitled to make that up elsewhere.

The record in this case, to which references have been made and which I shall not seek to repeat, and, I think, adequately indicated that the recent tendency of certain of the rates negotiated between carriers and the government have been unreasonably low. The Commission did so file, the California Commission, and apparently some of the witnesses who testified here have confirmed that by the evidence which they produced.

That being the case, we respectfully urge the court that the interests of the shippers, that segment of the public, dictates that they do not unnecessarily stand in the shadow of possible striking down of a state statute which simply seeks to follow the old familiar, simple rule that all rates [fol. 1090] shall be reasonable and just and without discrimination.

I subscribe fully to the assertion of counsel who have preceded me that, while this is an important case, it isn't

one without precedent. I feel that the decision of the Supreme Court in the Penn Dairies case, with the various authorities therein cited, amply illustrates the fact that the federal power will not extend to override a regulatory state statute. There are cases cited there on various types of activity, taxation, truck transportation as well, which amply support the conclusion which we respectfully urge that in this instance the California statute is a proper exercise of state jurisdiction and that there has been a failure to show any manner in which it infringes upon the constitutional jurisdiction of the federal government or upon the necessary powers employed thereunder which might be impinged upon by state activity.

Mr. McConnell: May it please the Court, just about two ideas that have come to my mind, and I won't burden the court any further.

Closing Argument by Mr. McConnell on Behalf of the Government

Mr. McGonnell: First, with respect to our witnesses, General Lasher spoke for the Defense Department, as he stated in his testimony, and there was a chain of delegation of authority for the entire Defense Department that probably went even higher than the Defense Department. This [fol. 1091] case did not originate, going into the matters, a few of those about the background, did not originate in any cubicle in the Justice Department, or anything of that sort. There were letters dating back from the time the question came up in Louisiana in 1950. From those letters, the early ones happen to be from the Judge Advocate General of the Army, through delegation of authority from the Secretary of Defense, asking the Attorney General of the United States to vigorously contest the rights of the states to engage in this parteiular type of regulatory activity.

With respect to the fact that we did use military witnesses, it is a military problem, from our viewpoint. We are not interested in inkwells, desks, and so on and so forth, as has been stated.

I think it's well to bear in mind, just as Mr. Poe brought out, that defense, national defense, has become a way of

life, tragic as it may be. I think we are prone to forget that. Remember General Marshall, who probably knew more about mobilizing the resources of this country than probably anybody forever, maybe, said a short time after he had made his study and devised the Marshall Plan, "We are in for a long period of tension." And it was his policy, as clearly brought out, as to not to keep that continually before the minds of the public. You can't be continually parading the fact that underneath there's always this in- [fol. 1092] tense preparation.

So we are not aware, probably, of the things that go on underneath as much as, say, a man like Colonel Chambers, who is supplying these strategic air commands, all right on the periphery of the Iron Curtain; as I say, men like Mr. Churchill who had been the prophet of the age, say but for this strategic air force, there would have been a conflagration by now. These men probably see it more than it's planned that the general public sees it.

Another thing, the court didn't want to concern itself with the law any more, and I will not, though it has been touched on. It is true that this matter has come to a head and has cropped out all over the country in the various states. That's one of the thing- that concerns us so much about it.

It has cropped up in the hoppers of Congress. There is a tug and flow, there is money involved here. We are not impugning any motives to anyone; we are saying motives frequently are mixed and an analysis has to take place in a slow and gradual way.

A distinguished bench, like this, is thoroughly familiar with the democratic process. This assault on Section 22 has gone on in Congress, has pushed it through states. This came out hurriedly—Texas, a sudden change. I think when you think about the one aspect of this thing which, as brought up in the Penn Dairies case, which has been [fol. 1093] intimated here, will lead it to Congress. Practical and realistic when you look at the thing. If you notice, there is nothing wrong with the Interstate Commerce clause cases in this regard: we cite Morgan against Virginia—we didn't cite it in our brief. It stands out as a good case where they are dealing with the regulation of segrega-

tion in buses, which in turn was based on a case that dovetailed into it dealing with the length of the trains down in Arizona. There the court categorically and unequivocally said this constitutional power standing alone is self-executed and untrammeled. Here you have this colored problem down there in Virginia. They argue in there you need an implemented statute. What lay behind the length of trains in Arizona, no one knows, but there are a great many unions involved in that thing.

I don't want to go out of the proprieties of the case, but there even in the commerce clause there is this great area in which the state can't act without any act of Congress at all. If that is true in the commerce clause, it's only dealing only with the commerce trade, a fortiori, it would seem to me, when you are dealing with the power to supply troops in the field you must say that it is unreserved in the few cases,—they're not in point—dealing with habeas corpus for a draftee or something—they say the power to support armies is plenty.

Judge Carter: Are you contending, then, that the Cali- [fol. 1094] fornia statute is unconstitutional on its face? Is that your argument?

Mr. McConnell: Well, I don't conceive that in a constitutional case you could ever say that it is unconstitutional on its face without reviewing the evidence and the operation of it.

Judge Carter: Well, an act making ex post facto——

Mr. McConnell: No, sir, I say that without any act of Congress, which we claim does cover the field broadly, that reviewing the power that is in the federal government to supply the troops, and the statute itself, that without any implementing act of Congress the statute in California is unconstitutional in the light of all the circumstances which have been developed here, that the Constitution itself in this particular area is self-executing, as it is in the commerce clause.

The cases are collated in Morgan against United States by Justice Reed, a number of the cases.

Just another comment, may it please the Court, because it came up again. This stipulation, and we say, we have always had the highest regard for the California Commis-

sion, the stipulation with respect to security and with respect to other modes of procedure of the Commission—in the first place, this is a national problem, as brought out by Mr. Poe and the others, state to state—we are dealing [fol. 1095] with all the states, and the principle is of national application.

Secondly, it is for all times and all places. No official can stop the government, the state government or the federal government as well.

I searched hard for some authority for this position and strange as it may seem, the only thread that came up was back in McCulloch against Maryland, where that same argument—in that case you remember they set a whole two days aside for it. There was Daniel Webster, William Work for the United States, Luther Martin, the brilliant lawyer who had been to the Constitutional Convention, was from Maryland, in that argument. It's 17 U. S. at page 429.

In his argument, as it is set out here, Luther Martin and the Attorney General for Maryland said that you must have confidence in us that we will not do this, that and the other thing, that we will use this power in a way that will not bring about this result.

Now, Justice Marshall answered that:

> "But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government. But is this a case of con- [fol. 1096] fidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of the state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of the government to which they have confided their most important and most valuable interests? The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, having this thing become national, although we might have confidence individually in a person, and so forth, these great constitutional issues cannot be resolved on that ephemeral basis.

Thank you very much.

Judge Lemmon: I am certain I speak for my associates as well as for myself when I say to counsel you have presented this case very ably; we feel you have tried the case on a very high plane and have been very helpful to the court in the argument and presentations.

We realize the importance of the case and the very heavy [fol. 1097] responsibility that rests upon the shoulders of the three judges of the court.

There was something said at the last session, and I think we might consider it now, whether you wanted any written memoranda in connection with the case. I see no occasion for that.

Mr. McConnell: We feel, if the Court please, because of the court's great indulgence, we have presented our side on everything we could think of.

Mr. Phelps: Yes, Your Honors, we have no desire to add anything.

Judge Lemmon: The matter may stand submitted.

[fol. 1098] IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

[Title omitted]

EXAMPLES OF U. S. GOVERNMENT SHIPMENTS OFFERED BY PLAINTIFF'S WITNESSES, WITH REFERENCES TO TRANSCRIPT AND EXHIBITS

GROUP I

Commingled Goods

(1) Strategic ore of General Services Administration; Tracy Annex; part originated within, part without state; unloaded into one big pile (Witness Hall, Tr. p. 130).

(2) Nuts and bolts in bins and drawers not segregated by origin point (Witness Hall, Tr. p. 131).

(3) Three pieces of Bucyrus-Erie earthmoving equipment; from Ohio; one never issued; another to Orient and return; another issued during flood emergency and returned; "I presume that that latter one now would be an intrastate piece of equipment" (Witness Hall, Tr. p. 131).

GROUP II

Shipments That Were Urgent and/or to Out-of-Way Places

(1) 3,000,000 pounds of ammunition boxes; emergency; [fol. 1099] no rates other than class rate; clearance within 4 or 5 hours; movement started next day (Witness Hall, Tr. pp. 136, 137).

(2) Tanks for repair; from Camp Irwin, tank training center; referred to Office of Chief of Transportation who discussed situation with carriers; rate effective without delay; able to continue shipping tanks; training program continued on schedule (Witness Hall, Tr. pp. 137, 138).

(3) Engine for C-124 aircraft in Japan; priority number one; Norton to Travis Air Force Base; ready for installation in Japan 48 hours later (Witness Chambers, Tr. 225, 226).

(4) 75 carloads of tanks and guns from Camp Pendleton to 29 Palms; combat training mission; rate negotiation requested; shipment already moving by rail; saved $20,000.00 (Witness Stallings, Tr. pp. 327, 332; Witness Hill, Tr. p. 363).

(5) Mounted guns from Lacarne, Ohio, to Fort Ord, California; to move same day request for rate was made; only class rate available; took several days to establish rate; made effective retroactively; class rate $8.00 per cwt., negotiated rate $4.50 (Witness Hill, Tr. pp. 363, 364).

GROUP III

Additional Time Required for Classifying and Rating Pursuant to Public Utility Commission Minimum Rate Tariff No. 2

(1) Exhibit 6, Bill of Lading No. N-17988945; 40,000 lb. truckload mixed shipment; 550 pieces; 218 items; 4 hrs. 15 min. to apply general freight classification, etc.; 226 items, 17 hrs. 15 min. to apply specific freight classification, etc. (Witness Bengtson, Tr. p. 245; Witness McKinney, Tr. 290, et seq.).

[fol. 1100] * [Rate 50¢ per cwt.; total 41,788 lbs.; distance 567 miles; earnings $0.3861375 per mile (see pencilled notations and calculations on Sheet 1 of Enclosure 2 of Exhibit 6); carrier All State Transportation Company.]

GROUP IV

Increased Charges Resulting from Application of Public Utilities Commission Minimum Rate Tariff No. 2

(1) Exhibit 3, Bill of Lading No. 22258811; mixed shipment; 148 pieces from Naval Air Station, Alameda, to North Island; 46,729 lbs.; charge $271.03 vs. PUC Minimum Rate Tariff No. 2 charge of $478.00 (Witness McKinney, Tr. p. 275).

* [50 min. to classify and rate under PUC Minimum Rate Tariff No. 2; carrier All State Transportation Company.]

(2) Exhibit 4, Bill of Lading No. N-8270211; mixed shipment; 289 miscellaneous items; 41,000 lbs. from Naval Supply Center, Oakland, to Long Beach Naval Shipyard; charge $144.41 vs. PUC Minimum Rate Tariff No. 2 charge of $252.06 (Witness McKinney, Tr. p. 275).

* [3 hrs. 35 min. to classify and rate 289 pieces under PUC Minimum Rate Tariff No. 2; gross revenue per mile $0.3132537; carrier All State Transportation Company.]

(3) Exhibit 5, Bill of Lading No. N-31013319; mixed shipment; 158 items; 16,000 lbs. from Naval Air Station, North Island, to Naval Auxiliary Station, El Centro; charge $80.00 vs. PUC Minimum Rate Tariff No. 2 charge of $155.55 (Witness McKinney, Tr. p. 276).

* [40 min. to classify and rate 158 pieces under PUC Minimum Rate Tariff No. 2; gross revenue per mile $0.50314465; carrier A. B. James Freight Lines.]

(4) Radar from San Francisco to San Diego by rail; charge $400.00 vs. PUC Minimum Rate Tariff No. 2 charge of $1,250.00 (Witness Stallings, Tr. pp. 326, [fol. 1101] 332).

(5) 674 boxes of miscellaneous freight from San Francisco to Camp Pendleton; charge $180.00 vs. PUC Minimum Rate Tariff No. 2 charge of $300.00 (Witness Stallings, Tr. pp. 326, 332).

* [Carrier All State Transportation Co.]

(6) 75 carloads of tanks and heavy guns from Camp Pendleton to 29 Palms; combat training mission; rate negotiation requested; shipment already moving; by rail; saved $20,000.00 (Witness Stallings, Tr. pp. 327, 332; Witness Hill, Tr. p. 363).

(7) Mounted guns from Lacarne, Ohio, to Fort Ord, California; to move same day request for rate made; only class rate available; took several days to establish rate; made effective retroactively; class rate $8.00 per cwt., negotiated rate $4.50 (Witness Hill, Tr. pp. 363, 364).

(8) Mixed lot, Maywood to McClellan Air Force Base; charge $120.00 vs. PUC Minimum Rate Tariff No. 2 charge of $235.83 (Witness Broz, Tr. pp. 346, 353).

* [Carrier All State Transportation Company.]

** [Constructive mileage Maywood to McClellan Air Force Base 434 miles; $120.00 divided by 434 miles equals $0.2765 earnings per truck mile.]

(9) Mixed lot, Maywood to McClellan Air Force Base; charge $120.00 vs. PUC Minimum Rate Tariff No. 2 charge of $251.73 (Witness Broz, Tr. pp. 346, 353).

* [Carrier All State Transportation Company.]

** [Constructive mileage Maywood to McClellan Air Force Base 434 miles; $120.00 divided by 434 miles equals $0.2765 earnings per truck mile.]

(10) Mixed lot, Maywood to McClellan Air Force Base; [fol. 1102] charge $120.00 vs. PUC Minimum Rate Tariff No. 2 charge of $218.20 (Witness Broz, Tr. pp. 346, 353).

* [Carrier All State Transportation Company.]

** [Constructive mileage Maywood to McClellan Air Force Base 434 miles; $120.00 divided by 434 miles equals $0.2765 earnings per truck mile.]

(11) Small arms ammunition from Belmont Arizona, to Holland Field, Utah; commodity rate on small arms ammunition available in same territory but not applicable; negotiated rate by telephone; rate established prior to movement; saved $73,000.00 (Witness Flanagan, Tr. pp. 384, 385).

GROUP V

(1) Mark 56 Gyro from Schenectady (or Long Island) New York, to Oakland, to Mare Island, to San Diego, to Pacific Ocean area, to Bremerton and back to New York (Witness Bengtson, Tr. pp. 237, et seq.).

(2) Secret move; commodity, origin and destination withheld because classified; difference of $500,000.00 between class rate and rate established by negotiation (Witness Flanagan, Tr. pp. 388, 389).

Total number of examples—20.

* Adduced on cross-examination or by inspection of documents; not adduced on direct examination.

** Constructive mileage from Distance Table No. 4 established by Public Utilities Commission of the State of California.

[fol. 1109]

(See Opposite) ☞

Note:

Page 777 is on ca

[fol. 1102-A] PLAINTIFF'S EXHIBIT No. 3

Enclosure: (1) Bill of Lading N22258811

Origin: NAS Alameda, Calif.

Destination: NAS North Island, Calif.

Commodities: Engines, internal combustion; Steel, Jury Strut; Aeronautical instruments; Test set, radar; Electrical Apparatus; Screw brace, Compound 77 cu; Cylinder; Generator, starter; Ordnance, aeronautical; Indicator; Shape; Aluminum alloy; Oil cooler; valve assy; Spark Plugs; Tubing; Radio and Sound Signal; Airplane Engine Parts; Rack; Airplane Minor Structual; Ordnance; Actuator Assy; Control; Valve.

Distribution of mixed rule rates for commodities:

Classes	Weight	Total
1¼ — 178	826#	$ 14.70
1 — 142	1258#	17.86
3 — 113	9373#	105.91
4 — 100	25593#	255.93
5 — 85	7257#	61.68
A — 92	2422#	22.28
	46729#	$478.36

Total Cost Existing Rate tender	$271.03
Total Cost Mixed Rule	$478.36
*Gross Revenue per Ton Mile FAK	**
*Gross Revenue per Tone Mile Mixed Rule	**
*Gross Revenue per mile FAK	**
*Gross Revenue per mile Mixed Rule	**
Increase in earnings	44.6%
Manhours spent in classification, NCFCO	25 Minutes
Manhours spent in rating	25 Minutes
	50 Minutes

* Constructive mileage applies.

** Cannot figure as more than one truck probably used.

[fol. 1102-C] PLAINTIFF'S EXHIBIT No. 4

Enclosure (2) Bill of Lading N8270211
Origin: NSC Oakland, Calif.

Destination: Long Beach N S Y, Calif.

Commodities: Cable and wire; transformers; machinery parts; #2 sleeve; electrical applicances; S&A Forms; hardware; 1-4 blades; #1 bases; tee; heads; blocks; cable; refrigerators; contacts; clamps, clips; regulatorrs; fans; contacts; fuses, holders; lens, lamp; switches; washer; tubing; abrasive cloth; screws; elbows; valves; bulletin boards; flagstaffs, insulation; trays, locks; #2 trays; niter cake; clamps; flanges; hinges; pennants, flags; shackles, blocks; aluminum sheet; pipe covering; connectors; insulating materials; boxes, first aid; caps; files; rope; locker, steel; stripping; couplings; duck; box; chairs; head waterfog; amplifier; hose; laundry tubes; bearings; tubes, transmitting; control; pennant numbers; chain and other articles RSORL; pipe fitting floor mat; bolts; plastic sheets; packing; leather; network; resistors; terminal board; paper, recording; copper; enamel; roasting oven; electrical range; spare parts for electric range; shafts; bridge clamps; spoons; cards; slings; caster swivel; thermometer spare parts; covers for switches and resistors; life preservers

Distribution of mixed rule rates for commodities:

Classes	Weight	Total
77½ — 1	106	$ .73
1	4	.04
2	1805	14.62
3	9066	64.38
4	10786	67.96
A	6146	35.65
5	12166	64.49
E	1180	4.19
	41259	$252.06

[fol. 1102-D] B/L 8270211

Total Cost FAK	$144.41
Total Cost Mixed Rule	252.06
*Gross Revenue per ton mile FAK	.015184745
*Gross Revenue per ton mile Mixed Rule	.026504171
*Gross Revenue per mile FAK	.3132537
*Gross Revenue per mile Mixed Rule	.5467678
Increase in earnings	42.7%
Manhours spent in classification, NCFCO	2 hours 50 minutes
Manhours spent in rating and extension	45 minutes
Total	3 hours 35 minutes

* Constructive mileage applies.

[fol. 1102-E]

(See Opposite) ☞

Note:

Page 769 is on card 13.

[fol. 1103] PLAINTIFF'S EXHIBIT No. 5

Enclosure (3) Bill of Lading N31013319

Origin: NAS North Island, Calif.

Destination: NAAS, El Centro, Calif.

Commodities: Gear, Trans. Low and reverse sliding; Cover, fuselage fuel tank; Drill twist; Nipple, threaded; Gasket, valve housing; Valve assy.; Beltx; Tube; Pipe, cast iron; Belt, safety; Provisions; Capacitor, fixed paper; Enamel, ext and int gloss; Lining, brake; Electrodes, welding; invertor; Balloon; Antenna, mast; Pipe assembly tail; Oakite cleaning compound; Tank; Exhaust; Paint Thinner; Acid, sulfuric; Tube AO2; Thinner, dope and lacquer; Lube oil.

Distribution of mixed rule rates for commodities:

Classes	Weight	Total
D–1 — 164	3787#	$ 62.11
1½ — 123	65#	.80
1 — 82	5400#	44.28
2 — 74	775#	5.74
3 — 66	2087#	13.77
4 — 58	3696#	21.44
	15810#	$148.14
	+5%	7.41
		$155.55

Total Cost FAK	$ 80.00
Total Cost Mixed Rule	155.55
*Gross Revenue per Ton Mile FAK	.06364891
*Gross Revenue per Ton Mile Mixed Rule	.12375734
*Gross Revenue per mile FAK	.50314465
*Gross Revenue per mile Mixed Rule	.9783018
Increase in earnings	50.2%
Manhours spent in classification, NCFCO	10 Minutes
Manhours spent in rating and extending	10 Minutes
[fol. 1104] Manhours spent in evaluating	20 Minutes
	40 Minutes

* Constructive mileage applies.

[fol. 1105]

B/L 310 13 514

Cases		Weight	
D-1	~~170~~ 164	3787	$ 62.11
1½	~~128~~ 123	65	.80
1	~~86~~ 52	5400	44.28
2	~~76~~ 74	775	5.74
3	~~68~~ 66	2087	13.77
4	~~56~~ 58	3696	21.44
		15,810#	$ 148.14
		+5%	7.41
			$ 155.55

Total Cost F.A.K. $ 80.00

" " bill of L. 155 55

4	~~56~~ 58	3696	21.44
		15,810#	= 148.14
			+5% 7.41
			= 155.55

Total Cost FAK = $80.00

" " Mixed Rule = 155.55

Gross earnings per ton mile FAK = 0.06364891

" " " " Mixed Rule = 0.12375734

Gross earnings per mile FAK = 0.50314465

" " " " Mixed Rule = .9783018

Increase Earnings = 502%

Time spent - Classification = 10 Min.

Time spent - Rating & extending = 10 Min

Time spent - Calculating = 20 Min

40 Min

gross earnings figured on 159 mi.

Chgs figured on 159 constructive mi.

[fol. 1106]

(See Opposite) ☞

Note

Page 773 is on Card 13

[fol. 1107] PLAINTIFF'S EXHIBIT No. 6

OFFICE MEMORANDUM — UNITED STATES GOVERNMENT

Date: 29 February 1956

To: Officer in Charge
Navy Central Freight Control Office

From: Freight Terminal Officer

Subject: Classification Time Study

Encl: (1) Copy of bill of lading N-17988945 consisting of 36 pages and 218 line items.
(2) Copy of bill of lading N-17988945 consisting of 39 pages and 226 line items.

1. In reply to your recent verbal request the following information is submitted:

	Hrs	Min
(a) Enclosure (1)		
To apply general freight classifications, apply codes and to add and balance weights and codes	4	15
Total	4	15
(b) Enclosure (2)		
Check Federal Stock Numbers	1	
Checking with Technical Divisions		20
To apply specific freight classifications and apply codes	14	
To add and balance weights and codes	2	30
Total	17	50

/s/ H. L. RAGAIN
H. L. Ragain
By direction

[fol. 1110] PLAINTIFF'S EXHIBIT NO. 7

No. 1824

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed documents are photostatic copies of letters addressed to Earl Warren, Governor of California, from Secretary of War, Henry L. Stimson and Acting Secretary of War, Jno. J. McCloy, relating to acceptance of federal jurisdiction covering military reservations in the State of California, lists of such military reservations being attached to said correspondence,

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this fifteenth day of March A. D. 1956

/s/ KENNETH C. SMITH
Supervising Land Title Abstractor
State Lands Division
STATE LANDS COMMISSION

(SEAL)

[fol. 1111]

C
O
P
Y

CE 680.2 SPELD
(State of California)

January 8, 1943

Honorable Earl Warren,
Governor of California,
Sacramento, California.

Dear Governor Warren:

This is to advise you that the United States has acquired title in fee simple to certain lands located in the State of California, more fully described in the list of military reservations inclosed, designated as Exhibit "A". Further information, if desired, as to the description of the lands may be obtained from the Office of the U. S. Division Engineer of the Pacific Division, 19 West South Temple Street, Salt Lake City, Utah.

Pursuant to section 355, Revised Statutes, as amended by the acts of Congress approved February 1, 1940 (54 Stat. 19), and October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), notice is hereby given that the United States accepts exclusive jurisdiction over these lands, effective as of the 15th day of January, 1943, at 12:00 noon. The transfer of such jurisdiction has been authorized by the provisions of section 33 of The Political Code of California, and section 34 of said Code as amended by an act of the Legislature of California, approved July 5, 1939 (Cal. Stat. 1939, chap. 710, p. 2231).

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

/s/ Henry L. Stimson
Secretary of War.

1 Incl.
Exhibit "A".

[fol. 1112]

LIST OF MILITARY RESERVATIONS

NAME	LOCATION	DATE OF DIRECTIVE	PURPOSE or USE	TOTAL AREA IN ACRES (MORE OR LESS)	HOW ACQUIRED
Camp Beale	Marysville, Yuba County	2- 4-42 and 3-11-42	Triangular Division	41,557.24	Purchase and Condemnation
Cal-Aero Airport	Ontario, San Bernardino County	4-22-42	Air School	288.37	Purchase
Chico Army Flying School	Chico, Butte County	5-29-42	Satellite Field A-1 at Orland	560.00	Condemnation
Camp Cooke	Santa Maria-Lompoc; San Luis Obispo & Santa Barbara Counties	8- 1-42 and 8-25-42	Triangular Division	87,046.29	Purchase and Condemnation
Consolidated Aircraft Corporation	San Diego, San Diego County	2-21-42	Manufacture of Heavy Bombers	3.62	Condemnation
Delano Airfield	Delano, Kern County	6-13-42	Airfield	379.44	Purchase and Condemnation
Fontana Ordnance Plant	Fontana, San Bernardino County	2- 9-42	Ammunition Backup Storage	2,845.10	Purchase and Condemnation
Fort Funston	San Francisco, San Francisco County	4-24-42	Expansion of Facilities	59.16	Purchase and Condemnation

EXHIBIT "A"
Page 1

[fol. 1113]

LIST OF MILITARY RESERVATIONS

NAME	LOCATION	DATE OF DIRECTIVE	PURPOSE or USE	TOTAL AREA IN ACRES (MORE OR LESS)	HOW ACQUIRED
Gardner Field	Kern County	9-29-42	Civilian War Housing	6.97	Condemnation
Camp Haan	Riverside County	8-12-42	Camp Site	1,777.53	Purchase and Condemnation
Hamilton Field	Sonoma County	1-10-42	Expansion	57.81	Purchase
Hammer Field	Fresno County	10-22-41	Ordnance Storage Facilities	318.90	Purchase and Condemnation
Hammond General Hospital	Modesto, Stanislaus County	5-23-42	Sewage Disposal Plant	55.00	Purchase and Condemnation
Kinner Motors Inc.	Glendale, Los Angeles County	4-30-42	Expansion of Tank accessory Plant	7.62	Purchase and Condemnation
Lathrop Holding and Reconsignment Depot	Stockton, San Joaquin County	12-31-41	Holding and Reconsignment Depot	718.37	Condemnation
Harbor Defenses of Los Angeles	Point Vicente, Los Angeles County	1-15-42	Harbor Defenses	107.77	Condemnation

EXHIBIT "A"
Page 2

[fol. 1114]

LIST OF MILITARY RESERVATIONS

NAME	LOCATION	DATE OF DIRECTIVE	PURPOSE or USE	TOTAL AREA IN ACRES (MORE OR LESS)	HOW ACQUIRED
Harbor Defenses of Los Angeles	White Point, Los Angeles County	11-21-41 and 4-15-42	Harbor Defenses	161.89	Purchase and Condemnation
Mather Field	Mills, Sacramento County	5-11-42	Auxiliary Landing Field	631.68	Purchase and Condemnation
Mather Field	Mills, Sacramento County	5-13-42	Revetment Area	136.36	Condemnation
Mather Field	Mills, Sacramento County	8- 5-42	Franklin Auxiliary Landing Field A-3	658.36	Condemnation
Fort McArthur	San Pedro, Los Angeles County	3-17-42	Extension of Hospital Facilities	1.84	Purchase and Condemnation
Fort McArthur	San Pedro, Los Angeles County	3-28-42	Troop Housing and Ordnance Repair Shop & Warehouse	45.07	Condemnation
McClellan Field	Sacramento County	5- 7-42	Extension of Runways	29.40	Condemnation
Merced Air Base	Merced, Merced County	6- 2-42	Ballico Auxiliary Landing Field (A-3—P-1)	618.00	Purchase

EXHIBIT "A"
Page 3

[fol. 1115]

LIST OF MILITARY RESERVATIONS

NAME	LOCATION	DATE OF DIRECTIVE	PURPOSE or USE	TOTAL AREA IN ACRES (MORE OR LESS)	HOW ACQUIRED
Mussel Rock	San Mateo County	5-30-42	Fire Control Station	2.02	Purchase and Condemnation
Oakland Port of Embarkation	Alameda County	12-21-40	Expansion of Facilities	Balance of 86.96 acres acquired under this Directive over which jurisdiction has not previously been taken.	Purchase and Condemnation
Ontario Municipal Airport	Ontario, San Bernardino County	6-10-42	Airport	307.55	Purchase and Condemnation
Harbor Defenses of San Diego	San Diego, San Diego County	11-21-41	Harbor Defenses	26.62	Purchase and Condemnation
Harbor Defenses of San Diego	Coronado Beach, San Diego County	6-30-42	Harbor Defenses	412.14	Condemnation
San Francisco Port of Embarkation	San Francisco County	4-11-42	Railroad Storage and Classification Yard	10.57	Purchase and Condemnation
Camp San Luis Obispo	San Luis Obispo County	8-19-41	Dam Site	4,865.50	Purchase and Condemnation

EXHIBIT "A"
Page 4

[fol. 1116] LIST OF MILITARY RESERVATIONS

NAME	LOCATION	DATE OF DIRECTIVE	PURPOSE or USE	TOTAL AREA IN ACRES (MORE OR LESS)	HOW ACQUIRED
Stockton Quartermaster Depot	Stockton, San Joaquin County	5-18-42 and 6-13-42	Motor Base and Parking Lot and Installation of Railway tracks connecting Classification Yard.	32.38	Purchase and Condemnation
Tracy Quartermaster Depot	Lyoth, San Joaquin County	3-31-42	Quartermaster Depot	449.02	Condemnation
Yermo Holding and Reconsignment Depot	Yermo, San Bernardino County	1-16-42	Holding and Reconsignment Depot	1,716.22	Purchase and Condemnation

[fol. 1117] RECEIVED JAN 3 1944

WAR DEPARTMENT
SECRETARY'S OFFICE

1944 JAN 27 AM 9 : 11

Honorable Earl Warren,
Governor of California,
Sacramento, California.

Dear Governor Warren:

The laws of the State of California (Section 33 of the Political Code of California, and section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, chap. 710, p. 2231), permit the assumption of exclusive Federal jurisdiction over lands within that State acquired by the United States for military and certain other purposes.

Under section 356, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

Information is being assembled to assist you in complying with an act of the legislature of California approved May 17, 1943 (Cal. Stat., 1943, chap. 536), and will be forwarded under separate cover.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

HENRY L. STIMSON
Secretary of War.

The original of this letter of acceptance was received in the Office of the Governor on the 8th day of January, 1944.

/s/ EARL WARREN
Governor of the State of California

[fol. 1118] LIST OF MILITARY RESERVATIONS IN THE STATE OF CALIFORNIA ACQUIRED EITHER IN WHOLE OR IN PART FROM FEBRUARY 1, 1940 TO JANUARY 3, 1944, INCLUSIVE

Designation	County	Remarks
Anza, Camp	Riverside	Formerly Arlington Staging Area
Athlone Auxiliary Field	Merced	Aux. #4 to Merced A. A. Field Formerly El Nido Auxiliary Field
Bakersfield Army Air Field	Kern	Formerly Oildale Field
Beale, Camp	Yuba and Nevada	
Benicia Arsenal	Solano	
Birmingham General Hospital	Los Angeles	Formerly Van Nuys General Hosp.
Blythe Army Air Field	Riverside	
Bolinas Station	Marin	H. D. of San Francisco
Bolsa Chica Station	Orange	H. D. of Los Angeles
Cal-Aero Academy	San Bernardino	

Designation	County	Remarks
Campbell Auxiliary Field	Tehama	Aux. #4 to Chico A. A. Field
Chico Army Air Field	Butte	
Concord Army Air Field	Contra Costa	Formerly Buchanan Field
Cooke, Camp	San Luis Obispo and Santa Barbara	
Coronado Beach Station	San Diego	H. D. of San Diego
Delano Army Air Field	Kern	
Del Mar Encinitas Station	San Diego	H. D. of San Diego
Desert Center Army Air Field	Riverside	
Dewitt General Hospital	Placer	Formerly Auburn General Hospital
Dibble General Hospital	San Mateo	Formerly Palo Alto General Hosp.
Dunlap Auxiliary Field	Kern	Aux. #4 to Minter Field
Eagle Field	Fresno	
Elk Grove Auxiliary Field	Sacramento	Aux. #5 to Mather Field
Estrella Army Air Field	San Luis Obispo	
Eureka Auxiliary Field	Humboldt	Aux. to Hamilton Field
[fol. 1119]		
Fairfield-Suisun Army Air Field	Solano	
Franklin Auxiliary Field	Sacramento	Aux. #6 to Mather Field
Fresno Reception Center	Fresno	

Designation	County	Remarks
Funston, Fort	San Francisco	H. D. of San Francisco
Gardner Field	Kern	
Glendale Ordnance Plant	Los Angeles	Formerly Kinner Motors
Golden Gate National Cemetery	San Mateo	
Haan, Camp	Riverside	
Half Moon Bay Flight Strip	San Mateo	
Hamilton Field	Marin	
Hamilton Gunnery Range	Sanoma (Tubbs Island)	
Hammer Field	Fresno	Formerly Fresno Air Base
Hammond General Hospital	Stanislaus	
Hayward Army Air Field	Alameda	Formerly Russell City Army Air Field
Helendale Auxiliary Field	San Bernardino	Aux. #2 to Victorville Army Air Field
Helm Auxiliary Field	Fresno	Aux. #7 to Lemoore A. A. Field
Hoff General Hospital	Santa Barbara	
Howard Auxiliary Field	Merced	Aux. #3 to Merced A. A. Field
Hunter-Liggett Military Res.	Monterey	
Huron Auxiliary Field	Fresno	Aux. #2 to Lemoore A. A. Field Formerly Coalinga Air Field
Indian Satellite Field	Fresno	Aux. #3 to Lemoore A. A. Field

Designation	County	Remarks
Inyokern Auxiliary Field	Kern	Aux. to Muroc A. A. Field
Irwin, Camp	San Bernardino	Formerly Mojave Desert A. A. Range
Kingsbury Auxiliary Field	San Joaquin	Aux. #1 to Stockton Air Base
Kirkwood Auxiliary Field	Glenn	Aux. #2 to Chico A. A. Field Formerly Malton Aux. Field
Kohler, Camp	Sacramento	
LaJolla-Hermosa Station	San Diego	H. D. of San Diego
[fol. 1120]		
Lathrop Engineer Depot	San Joaquin	Formerly Stockton Holding and Reconsignment Depot
Lemoore Army Air Field	Kings	
Lincoln Auxiliary Field	Placer	Aux. #2 to Mather Field
Little Devil's Slide Station	San Mateo	H. D. of San Francisco
Lockett, Camp	San Diego	
Lockheed Air Terminal	Los Angeles	
Lomita Flight Strip	Los Angeles	
Long Beach Army Air Field	Los Angeles	
Los Angeles Back Up Storage Depot	San Bernardino	Formerly Fontana Back Up Storage Depot
Los Angeles Intransit Depot	Los Angeles	
Los Angeles Port of Embarkation	Los Angeles	

Designation	County	Remarks
Lost Hills Field	Kern	
MacArthur General Hospital	Los Angeles	H. D. of Los Angeles
MacArthur, Fort	Los Angeles	H. D. of Los Angeles
Manhattan Beach Station	Los Angeles	H. D. of Los Angeles
March Field	Riverside	
Marysville Army Air Field	Yuba	
Marysville Reception Center	Yuba	
Mather Field	Sacramento	
Mather Field Hospital	Sacramento	
McClellan Field	Sacramento	
McQuaide, Camp	Monterey	
Merced Army Air Field	Merced	
Merced, Camp	Merced	Formerly Reception Center
Mexican Border Site	San Diego	H. D. of San Diego
Milagra Ridge Station	San Mateo	H. D. of San Francisco
Minter Field	Kern	
Mira Loma Engineer Sub Depot	San Bernardino	Formerly Quartermaster Depot
Mirage Auxiliary Field	San Bernardino	Aux. #3 to Victorville A. A. Field Formerly Adelanto Aux. Field

[fol. 1121]

Muroc Army Air Field	San Bernardino, Kern and Los Angeles	

Designation	County	Remarks
Mussell Rock Station	San Mateo	H. D. of San Francisco
New Jerusalem Auxiliary Field	San Joaquin	Aux. #3 to Stockton Air Base
Oakland Army Air Field	Alameda	
Oakland Port and Gen. Depot	Alameda	Includes California Q.M. Depot
Oakland Sub Port of Embarkation	Alameda	Includes California Repair Sub Depot
Ocean Beach Station	San Diego	H. D. of San Diego Formerly San Diego Station
Ontario Army Air Field	San Bernardino	
Ord, Fort	Monterey	
Orland Auxiliary Field	Glenn	Aux. #1 to Chico A. A. Field
Oroville Army Air Field	Butte	
Oroville Auxiliary Field	Butte	Aux. #5 to Chico A. A. Field
Oxnard Flight Strip	Ventura	
Pasadena Station Hospital	Pasadena	Formerly Vista Del Arroyo General Hospital
Palm Springs Army Air Field	Riverside	
Plata Del Rey Station	Los Angeles	H. D. of Los Angeles
Polaris Flying Academy	Los Angeles	
Pomona Ordnance Depot	Los Angeles	
Pomona Remount Station	Los Angeles	Formerly Kellogg Ranch
Porterville Army Air Field	Tulare	

Designation	County	Remarks
Poso Auxiliary Field	Kern	Aux. #6 to Minter Field
Potter Auxiliary Field	Merced	Aux. #5 to Merced A. A. Field
Redding Army Air Field	Shasta	
Reyes, Point, Station	Marin	H. D. of San Francisco
Rice Army Air Field	Riverside	
Roberts, Camp	Monterey and San Luis Obispo	
Salinas Army Air Base	Monterey	
Salinas Hospital	Monterey	
[fol. 1122]		
San Bernardino Air Depot	San Bernardino	
San Bernardino Army Air Field	San Bernardino	Formerly Morrow Field
San Francisco Port of Embarkation	San Francisco	Includes Classification Yards
San Luis Obispo Camp	San Luis Obispo	
Santa Ana Army Air Base	Orange	
Santa Maria Army Air Field	Santa Barbara	
Santa Rosa Army Air Field	Sonoma	
Semi-Tropic Auxiliary Field	Kern	Aux. #5 to Minter Field Formerly Wasco Aux. Field
Shavers Summit Air Base	Riverside	Aux. to Thermal A. A. Field
Sierra Ordnance Depot	Lassen	

Designation	County	Remarks
Stockton Intransit Depot	San Joaquin	Formerly 4th Echelon Base and Ord. Motor Base and Q.M. and Ord. Depot
Stinson Beach Station	Marin	H. D. of San Francisco
Stoneman, Camp	Contra Costa	Formerly Pittsburg Staging Area
Summit Lake Auxiliary Field	Kings	Aux. #5 to Lemoore A. A. Field
Sutterville Auxiliary Field	Sacramento	Aux. to Hamilton Field Formerly Sacramento Airport
Thermal Army Air Field	Riverside	
Torney General Hospital	Riverside	
Tracy Auxiliary Field	San Joaquin	Aux. #5 to Stockton Air Base
Tracy Quartermaster Depot	San Joaquin	
Turlock Rehabilitation Center	Stanislaus	
Two Rocks Station	Sonoma	
Van Nuys Metropolitan Airport	Los Angeles	
Vincente, Point, Station	Los Angeles	H. D. of Los Angeles
Victorville Army Air Field	San Bernardino	
Victorville Bombing Ranges	San Bernardino	
Vina Auxiliary Field	Tehana	Aux. #3 to Chico A. A. Field Formerly Copeland Aux. Field
Visalia Army Air Field	Tulare	Formerly Sequio Field

Designation	County	Remarks
[fol. 1123]		
West Auxiliary Field	Fresno	Aux. #6 to Lemoore A. A. Field Formerly Huron Aux. Field
White Point Station	Los Angeles	H. D. of Los Angeles
Winters Flight Strip	Yolo	Aux. to Hamilton Field Formerly Winters-Davis Field
Yermo Holding and Reconsignment Depot	San Bernardino	
Young, Camp	Riverside	

[fol. 1124] COPY

WAR DEPARTMENT
Washington

August 16, 1944

Honorable Earl Warren,
Governor of California,
Sacramento, California.

Dear Governor Warren:

The laws of the State of California (Section 33 of the Political Code of California, and Section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, Chap. 710, p. 2231) permit the assumption of exclusive Federal jurisdiction over lands within that State acquired by the United States for military and certain other purposes.

Under Section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

Information is being assembled to assist you in complying with an act of the legislature of California approved May 17, 1943 (Cal. Stat., 1943, Chap. 536), and will be forwarded under separate cover.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

(signed: Jno. J. McCloy)
Acting Secretary of War

The original of this letter was received at the Governor's Office, Sacramento, Calif., on August 21, 1944.

/s/ Earl Warren
Governor

[fol. 1125] CE 680.2 (California, State of) SPELP

September 29, 1944.

Honorable Earl Warren,
Governor of California,
Sacramento, California.

Dear Governor Warren:

Reference is made to my letter of August 16, 1944, accepting exclusive jurisdiction over certain lands acquired by the United States for military purposes, in which it was stated that information was being assembled to assist you in complying with an act of the Legislature of California approved May 17, 1943 (Calif. Stat., 1943, Chap. 536).

There has now been prepared and is inclosed a list of military reservations in the State of California acquired either in whole or in part by the United States from Feb-

Standard Form No. 1103 a
Form approved by the Comptroller General of the U. S. 1947

U. S. GOVERNMENT BILL OF LADING

MEMORANDUM COPY

NO N22253511

CAR INITIALS AND NO.

NAME OF INITIAL TRANSPORTATION COMPANY
ALL STATE TRANSPORTATION CO. / INC.

TRAFFIC CONTROL NO.
12N 0945439/Q

STOP THIS CAR AT FOR

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF THE PUBLIC PROPERTY HEREINAFTER DESCRIBED IN APPARENT GOOD ORDER AND CONDITION CONTENTS AND VALUE UNKNOWN TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES THERETO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO CONSIGNEE

DATE CAR ORDERED | DATE CAR FURNISHED | MARKED CAPACITY OF CAR | DATE CAR FURNISHED | DATE B/L ISSUED
9/9/54

FROM (ORIGIN POINT)
ALAMEDA, CALIFORNIA

CONSIGNEE
RECEIVING OFFICER
NAVAL AIR STATION

MARKS
NAVAL AIR STATION
PRIORITY A DOD 15 SEP 54
RATE 58¢ CWT MIN WT 30,000 LBS PER SHIPMENT TENDER 9A S & A 5014
"INITIAL CARRIERS AGENT BY SIGNATURE BELOW CERTIFIES HE RECEIVED THE ORIG. B/L"
LOG BOOKS PACKED WITH ENGINES

CHARGES TO BE PAID TO (DEPARTMENT OR ESTABLISHMENT IN U.S. P.O. OR SERVICE AND LOCATION)

DESTINATION
NORTH ISLAND, CALIFORNIA

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)

APPROPRIATION CHARGEABLE
17X1803.57 NAVY 1955 99302 (10087)

ISSUING OFFICE
NAVAL AIR STATION, ALAMEDA, CALIFORNIA

NAME AND TITLE OF ISSUING OFFICER
CAPT. J.W. BOTTOMS, SC, USN
SUPPLY OFFICER, NAVAL AIR STATION
ALAMEDA, CALIFORNIA

PICKUP SERVICE AT ORIGIN WAS NOT BY THE GOVERNMENT OR ITS AGENT

INITIALS OF PERSON AUTHORIZED AGENT OR EMPLOYEE PM

FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY
SHOW ALSO CUBIC MEASUREMENTS OF SHIPMENTS VIA OCEAN CARRIER IN CASE WHERE RIGHT IS

PACKAGES NO	KIND	DESCRIPTION OF ARTICLES (USE CARRIERS' CLASSIFICATION OR TARIFF DESCRIPTION IF POSSIBLE OTHERWISE A CLEAR NON-TECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS
148	PCS.	MISC. NAVY MATERIAL AS LISTED PER ATTACHED SHEETS ONE THROUGH XX NINE	2848 CU.	46729#

16

5014 CODE 12/27TL 14 90
CODE 19/27TL 256 03

584
571.03

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT ..... DATED

(F. O. B. POINT NAMED IN CONTRACT)

CAPT. J.W. BOTTOMS, SC, USN
SIGNATURE OF ISSUING OFFICER
W.M. OFFICER, TRAFFIC MGR. (BY DIRECTION)

NAME OF TRANSPORTATION COMPANY
ALL STATE TRANSPORTATION CO. / INC.

DATE OF RECEIPT OF SHIPMENT 9-9-54

SIGNATURE OF AGENT

TITLE

MEMORANDUM COPY

OCT 5 1954

Price

Standard Form No. 1058a
Form approved by
Comptroller General, U. S.
1948

U. S. GOVERNMENT BILL OF LADING [redacted]

MEMORANDUM COPY.

No. N[redacted]0211

CAR INITIALS AND NO.

NAME OF INITIAL TRANSPORTATION COMPANY
ALL STATE TRANSPORTATION COMPANY, INC.

TRAFFIC CONTROL NO. [redacted]

STOP THIS CAR AT FOR

SIZE CAR IN FEET		MARKED CAPACITY OF CAR		DATE CAR FURNISHED	DATE B/L ISSUED
ORDERED	FURNISHED	ORDERED	FURNISHED		
					9-22-53

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE, SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF, THE PUBLIC PROPERTY HEREINAFTER DESCRIBED, IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN), TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND CONNECTING LINES, THERE TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM (SHIPPING POINT) [redacted], CALIFORNIA

FOR (FULL NAME AND ADDRESS OF CONSIGNEE) [redacted] SUPPLY CENTER

MARKS

[redacted] TO CARRIER DELIVERY OF THIS SHIPMENT [redacted] BEFORE 1500 HOURS.

5014

CONSIGNEE

RECEIVING OFFICER
LONG BEACH NAVAL SHIPYARD
BUILDING 53

15

DESTINATION
LONG BEACH, CALIFORNIA

CHARGES TO BE BILLED TO (DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION)

NAVY DEPARTMENT, BUREAU OF SUPPLIES AND ACCOUNTS

VIA (ROUTE JOURNEY ONLY WHEN SOME SUBSTANTIAL INTEREST OF THE GOVERNMENT IS SUBSERVED THEREBY)

APPROPRIATION CHARGEABLE
17[redacted]910.69 [redacted] 1956 BC 54001 LA 98003

ISSUING OFFICE [redacted] TERMINAL DEPARTMENT
[redacted] SUPPLY CENTER, OAKLAND, CALIFORNIA

NAME AND TITLE OF ISSUING OFFICER
COMM. B. [redacted]SKY, SC, USN, FTO

PICK-UP SERVICE AT ORIGIN (INSERT WAS OR WAS NOT) BY THE GOVERNMENT OR ITS AGENT FP

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

PACKAGES NO	PACKAGES KIND	DESCRIPTION OF ARTICLES (USE CARRIER'S CLASSIFICATION IF POSSIBLE OTHERWISE A CLEAR AND SPECIFIC DESCRIPTION)	NUMBERS OF PACKAGES	WEIGHTS*
269	PCS	MISC. MATERIAL AS LISTED ON ATTACHED SHEETS OR INDU #31. 1767 CW LESS WT OF 4 PLTS 403 LBS EACH RATE 0.35 CWT MIN WT 40,000 LBS PER VEHICLE. TENDER 10 SEA NO. 5014. Fibre boxes conform to all construction requirements of the Uniform Freight Classification.	1	41,250 338 40,912

79791

= 143 24

[redacted] 333 311

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR
PURCHASE ORDER NO.
OR OTHER AUTHORITY FOR SHIPMENT

DATED

(F. O. B. POINT NAMED IN CONTRACT)

COMM. B. SHAFSKY
SIGNATURE OF ISSUING OFFICER

BY DIRECTION

NAME OF TRANSPORTATION COMPANY
ALL STATE TRANSPORTATION COMPANY, INC.

DATE OF RECEIPT OF SHIPMENT
9/22/53

SIGNATURE OF AGENT
Frank Cantella PER

MEMORANDUM COPY

R & S OCT 1953
RATES CHECKED
DESK #2

OCT 5 9 5 6

Standard Form No. 1103

U. S. GOVERNMENT BILL OF LADING

MEMORANDUM COPY

NO N 31013319

CAR INITIALS AND NO.

NAME OF INITIAL TRANSPORTATION COMPANY

A.B. JAMES FREIGHT LINES

STOP THIS CAR AT FOR

TRAFFIC CONTROL NO.
R/O 12N-025977-Q

MARKED CAPACITY OF CAR ORDERED | DATE CAR FURNISHED | DATE B/L ISSUED

3/3/55

01

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF THE PUBLIC PROPERTY HEREINAFTER DESCRIBED IN APPARENT GOOD ORDER AND CONDITION EXCEPT AS NOTED AND VALUE UNKNOWN TO BE FORWARDED AT LEAST ONE OF THE SAID COMPANIES NAMED INCLUDING THERE TO BE DELIVERED NOT EXCEEDING ONE HUNDRED THOUSAND DOLLARS

NORTH ISLAND, CALIFORNIA

SO, NAVAL AIR STATION,

SECT. 22 QUOTATION TENDER 1 S&A NO. 4422 APPLIES

EXCLUSIVE USE OF VEHICLE AUTHORIZED PER R/O 12N-025977-Q

CONSIGNED

RECEIVING OFFICER
NAVAL AUXILIARY AIR STATION
EL CENTRO, CALIFORNIA

19
01

CHARGES TO BE ASSESSED TO THE DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION

DESTINATION

EL CENTRO, CALIFORNIA

APPROPRIATION AND FUND

VIA ROUTE JOURNEY ONLY WHEN SUCH SERVICE IS IN THE GOVERNMENT'S INTEREST

12X1106 3-57 SUSFN 10037 (99302)

NAVAL AIR STATION, NORTH ISLAND, CALIF.

PICK UP SERVICE AT ORIGIN NOV BY THE GOVERNMENT OR ITS AGENT

M.C. GRAVES, CAPT., SC USN SO

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

PACKAGES NO.	KIND	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	WEIGHT (SUBJECT TO CORRECTION)
			CUBE / AGREED
			613 / 15,810
198	PKGS	MISCELLANEOUS FREIGHT AS PER CONTINUATION SHEETS NOS. TWO, THREE, FOUR, FIVE AND SIX (2-3-4-5-6) ATTACHED	
		SHIPPER'S AGENT, BY SIGNATURE BELOW, CERTIFIES HE RECEIVED THE ORIGINAL B/L	
			T: 10,680 5405
			H: 5,129 5405

SCL

50
20 FT
40
—
60

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT

DATED

O & D POINT NAMED IN CONTRACT

SIGNATURE OF ISSUING OFFICER

NAME OF TRANSPORTATION COMPANY

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT

A.B. JAMES FREIGHT LINES

5-3

PER

MEMORANDUM COPY

RATES CHECKED
DESK #2

JUN 1855

Standard Form No. 1103-A

U. S. GOVERNMENT BILL OF LADING

MEMORANDUM COPY

No. 17 988 945

BH

NAME OF INITIAL TRANSPORTATION COMPANY

ALL STATE TRANSPORTATION CO. INC.

TRUCK AT NSD SAN DIEGO
FOR PARTIAL UNLOADING OF
506 PCS 1736 CU. 39,363 LBS

TRAFFIC CONTROL NO.

R/O 12N 0261382-Q

RAILCAR NUMBERS ORDERED	RAILCAR NUMBERS FURNISHED	MARKED CAPACITY OF CAR ORDERED	MARKED CAPACITY OF CAR FURNISHED	DATE CAR FURNISHED	DATE B/L ISSUED
					29 FEB 1956

RECEIVED BY THE TRANSPORTATION COMPANY NAMED ABOVE SUBJECT TO CONDITIONS NAMED ON THE REVERSE HEREOF THE PUBLIC PROPERTY HEREINAFTER DESCRIBED IN APPARENT GOOD ORDER AND CONDITION (CONTENTS AND VALUE UNKNOWN) TO BE FORWARDED TO DESTINATION BY THE SAID COMPANY AND (UNLESS OTHERWISE INDICATED HEREIN) TO BE DELIVERED IN LIKE GOOD ORDER AND CONDITION TO SAID CONSIGNEE.

FROM (SHIPPING POINT)

OAKLAND, CALIFORNIA

FROM (FULL NAME OF SHIPPER)

FTD, NAVAL SUPPLY CENTER

MARKS

4 BXS PAGE 21 NORMAL REFRIGERATION REQUIRED WHEN HELD AT TERMINAL. REFIRG. NOT NECESSARY FOR PERIODS IN TRANSIT. NOT TO EXCEED 72 HOURS.

CONSIGNEE

RECEIVING OFFICER
NAVAL REPAIR FACILITY
FOOT OF 32ND STREET BLDG 116

DESTINATION

SAN DIEGO, CALIFORNIA

CHARGES TO BE BILLED TO (DEPARTMENT OR ESTABLISHMENT AND BUREAU OR SERVICE AND LOCATION)

NAVY DEPARTMENT BUREAU OF SUPPLIES AND ACCOUNTS

APPROPRIATION CHARGEABLE

17X4910.69 NMF 1956 BC 5600 EA 98003

ISSUING OFFICE

FREIGHT TERMINAL DEPARTMENT
NAVAL SUPPLY CENTER, OAKLAND, CALIFORNIA

NAME AND TITLE OF ISSUING OFFICER

CAPT B SHAFSKY SC USN FTO

* FURNISH THIS INFORMATION IN CASE OF CARLOAD SHIPMENTS ONLY
* SHOW ALSO CUBIC MEASUREMENTS FOR SHIPMENTS TO OCEAN CARRIER, IN CASES WHERE REQUIRED

BAL ORDERS DON

PICK-UP SERVICE AT ORIGIN — PERFORMED BY THE GOVERNMENT OR ITS AGENT

INITIALS OF SHIPPER'S AUTHORIZED AGENT OR EMPLOYEE

T.H.

PACKAGES NO.	PACKAGES KIND	DESCRIPTION OF ARTICLES (IF CARRIER'S CLASSIFICATION OR TARIFF DESCRIPTION IS POSSIBLE, OTHERWISE A CLEAR NON-TECHNICAL DESCRIPTION)	NUMBERS ON PACKAGES	WEIGHTS* ACTUAL
550	PCS.	MISCELLANEOUS MATERIAL AS LISTED ON ATTACHED SHEETS #2 THRU #[redacted]		
		1855 CU.		41,788
		"RATE $.50 CWT MINIMUM WEIGHT 40,000 LBS. PER VEHICLE TENDER 10 S &A NO. 5014."		

THIS BILL IS SUBJECT TO ALL CONDITIONS OF APPROPRIATE CLASSIFICATION

_____EQUIP. ORD. ____EQUIP. FURN.

X-341
X-333
X-L 108
X-310

THE PROPERTY DESCRIBED ABOVE WAS RECEIVED AND IS HELD SUBJECT TO THE REGULATIONS PRESCRIBED BY THE INTERSTATE COMMERCE COMMISSION.

THE CARRIER'S AGENT BY SIGNATURE BELOW CERTIFIES HE RECEIVED THE ORIGINAL BILL OF LADING AND [redacted] COPIES OF INVOICE.

CERTIFICATE OF ISSUING OFFICER

CONTRACT NO. OR PURCHASE ORDER NO. OR OTHER AUTHORITY FOR SHIPMENT

DATED

(F. O. B. POINT NAMED IN CONTRACT)

CAPT B SHAFSKY
SIGNATURE OF ISSUING OFFICER

BY DIRECTION

NAME OF TRANSPORTATION COMPANY

ALL STATE TRANSPORTATION COMPANY INC.

DATE OF RECEIPT OF SHIPMENT

SIGNATURE OF AGENT

PER

MEMORANDUM COPY

☆ U.S. GOVERNMENT PRINTING OFFICE : 16-44178

[fol. 1109]

U S GOVERNMENT BILL OF LADING—MEMORANDUM
CONTINUATION SHEET

BH

N 17 988 945

FTD, NAVAL SUPPLY CENTER, OAKLAND, CALIFORNIA

#38

17X4910.69 NMF 1956 BC 56001 EA 98003
RO, NAVAL REPAIR FACILITY
FOOT OF 32ND STREET BLDG 116
SAN DIEGO, CALIFORNIA

FOR: FLEET CAMERA PARTY

AUTH:62752-9909-56 ASDINV: 120561-1(MSTR)
1 BOX 1 PAPER PHOTOGRAPHIC, SENSITIZED
5 CU. 110
X-341/54-5
CODE--ER

- - - - - - - - - - - - - - - - - -

FOR: U.S.S. BOYDE (DD 544)

AUTH:DD 544-611-56 SSD INV: 250735-1
4 BXS# 1-4 MACHINERY PARTS, NOIBN I/S
8 CU. 300
X-341/54-2
CODE--HR

- - - - - - - - - - - - - - - - - -

FOR: U.S.S. HOPEWELL (DD 681)

AUTH:DD681-962-56 SSD INV: 220537-0
1 BOX# 1 VALVES, NOIBN I/S NOT PLATED
1 CU. 34
X-341/46-1
CODE--HR

ruary 1, 1940, to August 16, 1944, inclusive. For convenience in locating and identifying these establishments, the counties in which they are located and former designation, if any, are also furnished.

It is believed that this list is complete and accurate. However, because of the large number of land acquisitions in California, it cannot be warranted to be complete and is not to be considered as limiting the scope of my letters accepting exclusive jurisdiction dated April 18, 1943, January 3, 1944, and August 16, 1944.

Sincerely yours,

HENRY L. STIMSON
Secretary of War.

1 Incl.
List of reservations.

COPY FOR THE DIVISION ENGINEER, PACIFIC DIVISION

[fol. 1126] OSW 680.2 California (5-23-45)

RECEIVED

WAR DEPARTMENT
SECRETARY'S OFFICE

1945 JUN 5 AM 9:00

23 May 1945

Honorable Earl Warren
Governor of California
Sacramento, California

Dear Governor Warren:

The laws of the State of California (Section 33 of the Political Code of California, and Section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, Chap. 710, p. 2231) permit the assumption of exclusive Federal jurisdiction over lands within that State acquired by the United States for military and certain other purposes.

Under Section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

Information is being assembled to assist you in complying with an act of the Legislature of California approved May 17, 1943 (Cal. Stat., 1943, Chap. 536), and will be forwarded under separate cover.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

HENRY L. STIMSON
Secretary of War

The original of this letter of acceptance was received in the Office of the Governor, on the day of , 1945.

/s/ EARL WARREN
Governor of the State of California

[fol. 1127] PLAINTIFF'S EXHIBIT NO. 8

(Letterhead of State Lands Commission,
Los Angeles, California)

W. O. 1868

February 1, 1955

Secretary of the Army
Department of the Army
Washington 25, D. C.

My dear Mr. Secretary:

Jurisdiction—Sierra Ordnance Depot
Herlong, Lassen County, California

Enclosed for your records is a certified copy of the action taken by the State Lands Commission at its meeting held December 17, 1954, in connection with the acceptance of jurisdiction on behalf of the United States over 33,800 acres of land, more or less, comprising the Sierra Ordnance Depot, Herlong, Lassen County, California.

Pursuant to Section 126 of the Government Code of the State of California, certified copies of the attached resolution were filed with the County Recorder of the County of Lassen, California, and the Office of the Secretary of State, State of California.

Acknowledgment of such filings were made by W. W. Packwood, County Recorder, Lassen County, California, January 21, 1955, and by a Certificate of Filing dated January 31, 1955, signed by Walter C. Stutler, Deputy Secretary of State, on behalf of Frank M. Jordan, Secretary of [fol. 1128] State, State of California. The document is recorded on Official Records of Lassen County in Volume 107, at page 363, Instrument No. 2318.

Yours very truly,

/s/ RUFUS W. PUTNAM
Rufus W. Putnam
Executive Officer

FWP:mh

Enc. Certified Copy
of Resolution

c.c. Colonel P. D. Berrigan, Division Engineer
South Pacific Division
Corps of Engineers, U. S. Army
130 Sutter Street
San Francisco 4, California

Mr. J. Otis Brown
Real Estate Division
Office of the Division Engineer
South Pacific Division
Corps of Engineers, U. S. Army
130 Sutter Street
San Francisco 4, California
(with certified copy of Resolution)

Mr. Walter S. Rountree
Assistant Attorney General
Department of Justice
600 State Building
Los Angeles 12, California

[fol. 1129]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. L.A. 1672

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of the resolution adopted by the State Lands Commission at its meeting held December 17, 1954, at Sacramento, California (Item 26,

Minute pages 2213 through 2220, inclusive). on file in the office of the State Lands Commission; that said Minute Item has been compared by the undersigned with the original, and is a correct transcript therefrom,

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this First day of February A. D. 1955

/s/ RUFUS W. PUTNAM
Executive Officer
STATE LANDS COMMISSION

(SEAL)

[fol. 1130] EXCERPT FROM MINUTES OF THE MEETING OF THE STATE LANDS COMMISSION HELD IN SACRAMENTO, CALIFORNIA, ON DECEMBER 17, 1954

(MINUTE PAGES 2213–2220)

26. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY THE SIERRA ORDNANCE DEPOT, COUNTY OF LASSEN, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126 GOVERNMENT CODE—W.O. 1868.) The Commission's staff reported as follows:

"On February 9, 1954 the Commission authorized the Executive Officer to order and conduct the requisite hearings pursuant to Section 126 of the Government Code and under rules and regulations adopted by the Commission on June 14, 1949 on applications relating to acquisition of lands by the United States, subject to report to the Commission of the determinations of hearings for final consideration and action.

"On June 25, 1954 an application for acceptance of jurisdiction by the United States over lands comprising the Sierra Ordnance Depot, Herlong, Lassen County, California, was executed by the Honorable Robert T. Stevens, Secretary of the Army.

"Pursuant to said application, arrangements were made to conduct the requisite public hearing at Room No. 30, Courthouse, County of Lassen, Susanville, California, at 10 a.m., Tuesday, September 14, 1954.

[fol. 1131] "The notice of said public hearing was published in the 'Lassen Advocate', Susanville, California, on August 26, 1954, and service on the clerk of the Board of Supervisors of Lassen County was made on the 24th day of August, 1954. Notices were thus published and served in compliance with Section 2602, California Administrative Code, Title 2.

"The hearing was held by the Executive Officer at Room No. 30, Courthouse, County of Lassen, Tuesday, September 14, 1954, from 10 a.m. to 12 M., and and continued thereafter at Room 102 Business and Professions Building, Sacramento, California, at 10 a.m., November 9, 1954. A record of the hearing was made and the transcript was made a part of the Commission record in this case. The Attorney General was represented by Walter S. Rountree, Assistant Attorney General. Appearances were made on behalf of the applicant by Mr. J. Otis Brown, Real Estate Division, South Pacific Division, Corps of Engineers, United States Army; Mr. R. H. Hamblin and Mr. J. O. Mauborgne of the San Francisco District, Corps of Engineers, United States Army; Colonel G. H. Leavitt and Captain William K. Bouldin, Jr., of the Sierra Ordnance Depot.

"Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain specified conditions. Oral and documentary evidence were presented and received at the hearing in support of the contention of the applicant that these conditions have been met and complied with. Conclusions in regard to their presentation are as follows:

"Evidence was presented at the hearing to the effect that the acquisition was made for the 'erection of forts, magazines, arsenals, dock yards, and other

needful buildings within the purview of Clause 17, Section 8, Article 1, of the Constitution of the United States.' According to that evidence, the United States Sierra Ordnance Depot, Lassen County, California, has as its mission the receipt, storage and issue of ammunition within an assigned area; the functional packing of small arms; and the testing of small arms. It has the mission of the distribution of ammunition to individuals, clubs, etc., as authorized by the National Rifle Association; the receipt, storage and issue of guided missiles is an additional responsibility.

"The second condition requires that a finding must be made that 'the acquisition must be pursuant to and in compliance with the laws of the United States'. Acquisition of the property has been had by the United States by condemnation, by purchase, by executive and public land orders, and by leasehold agreements. The property was acquired pursuant to authorization contained in an Act of Congress approved July 2, 1917 (50 U. S. Code 171, 40 Stat. 241) and an Act of Congress approved March 27, 1942 (50 USC Appendix 632, 56 Stat. [fol. 1132] 176). Supplemental thereto, the acquisition was made under a series of real estate directives issued by the Chief of Engineers, War Department, under authority of an Act of Congress, December 1, 1941. Acquisitions by condemnation were made pursuant to an Act of Congress approved August 18, 1898 (26 Stat. 316).

"By testimony presented and documentary evidence introduced by the applicant, it was established that all statutory requirements have been fully complied with. It was further established by the same means that the United States has title to or holds under leasehold all of the lands covered by the application as filed with the Commission.

"The third condition upon which a finding is required is to the effect that 'The United States must

in writing have assented to acceptance of jurisdiction over the lands upon and subject to each and all of the conditons and reservations in this section prescribed'. Under the provisions of an Act of Congress of October 9, 1940, Public Law 825, 'The head or other authorized officer of any department of the government' may accept jurisdiction from the State. A letter from the Secretary of the Army dated June 25, 1954 and signed by him (Robert T. Stevens) and accepting jurisdiction over the subject installation on behalf of the United States was received by the Division of State Lands June 28, 1954. This acceptance is made subject to each and all of the conditions and reservations described in Section 126, Government Code, State of California, and is, therefore, in accordance with law and with the rules of the Commission. The form and substance of this application has been approved by the Office of the Attorney General.

"The fourth requirement is that the Commission must have found and declared that the acquisition is in the interest of the State. Testimony was presented to the effect that the Sierra Ordnance Depot was established under General Order No. 9 (February 5, 1942) as one of a series of ordnance depots, United States Army, and is an integral part of the national defense system. It serves as a distribution center for ammunition for sale to individuals, clubs, etc., as authorized by the National Rifle Association, as part of the marksmanship program. The total population of the installation is approximately 4,500 people, having a gross monthly payroll of approximately $700,000. A large portion of this monthly income is expended by the depot's population in Susanville and other communities surrounding the base. Testimony was also presented to the effect that since the installation of the depot the City of Susanville has grown some three to four thousand in population. All of these factors indicate that the installation of the depot has re-

sulted in an economic benefit to the surrounding [fol. 1133] area and the State in general. It was further established that the installation has its own source of water supply, which is more than adequate to take care of its present and possible future needs. Testimony was presented to the effect that neither the United States nor the State or its agents were exercising adequate law enforcement or processing civil cases as adequately as would result from the clarification of jurisdictional status that would accompany the granting of the application for Federal jurisdiction.

"No appearances were made in opposition to the application.

SUMMARY

"The hearings on this case were held at Susanville, California, on September 14, 1954 and continued thereafter at Sacramento, California, on November 9, 1954, pursuant to Commission authority. The findings of the hearing officer are as follows:

1. The property involves some 33,800 acres, more or less, of land in the County of Lassen. The acquisition comes within the purview of Clause 17, Section 8, Article 1, of the Constitution of the United States, which requires that it be 'for the erection of forts, magazines, arsenals, dock yards, and other needful buildings or other public purposes'.

2. The acquisition was by condemnation, purchase, executive and public land orders, and leasehold agreements, and was made pursuant to the laws of the United States.

3. The United States, through the Secretary of the Army, has assented in writing to acquisition of jurisdiction subject to all the conditions of Section 126 of the Government Code, State of California, as amended by Statutes of 1953, Chapter 1856.

4. Acquisition is in the interest of the State, in view of its value for national defense and of its substantial contributions to the economy of the area and the State.

5. All requirements of Section 126 of the Government Code of the State of California have been complied with by the applicant and by the State Lands Commission and its staff.

"This calendar item has been reviewed and approved by the Office of the Attorney General."

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, IT WAS RESOLVED AS FOLLOWS:

[fol. 1134] THE STATE LANDS COMMISSION FINDS AND DECLARES, WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED BY THE UNITED STATES AND NOW USED BY THE DEPARTMENT OF THE ARMY AS AN ORDNANCE DEPOT AT HERLONG, LASSEN COUNTY, CALIFORNIA, SAID LANDS BEING DESCRIBED IN EXHIBIT "A", ATTACHED HERETO AND HEREBY MADE A PART HEREOF, THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS A, B, AND C OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALIFORNIA, HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST, AND THAT SUCH ACQUISITION IS IN THE INTERESTS OF THE STATE; FURTHER, THAT THE EXECUTIVE OFFICER IS DIRECTED TO FILE A CERTIFIED COPY OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE AND TO HAVE ONE RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE COUNTY OF LASSEN.

ATTACHMENT: EXHIBIT "A"

[fol. 1135] EXHIBIT "A"

PERIMETER DESCRIPTION OF SIERRA ORDNANCE DEPOT

All that real property situate in the County of Lassen, State of California, and being more particularly described as follows:

Parcel I

Beginning at the section corner common to Sections 33 and 34, T. 27 N., R. 16 E., M.D.M., and Sections 3 and 4, T. 26 N., R. 16 E., M.D.M.; thence along the following courses and distances, N. 1° 05′ E. 5239.08′ to N.W. Corner of Section 34; thence N. 0° 54′ E. 5239.08′ to N.W. Corner of Section 27; thence North 1056.00′ to the meander line of Honey Lake; thence N. 52° 30′ E. 1716.00′; thence N. 12° 00′ E. 1782.00 feet; thence N. 9° W. 1452.00 feet; thence N. 27° 45′ W. 3168.00 feet; thence N. 29° 45′ W. 2904.00′; thence N. 42° 00′ W. 1980.00 feet; thence N. 87° W. 1848.00 feet; thence N. 65° W. 726.00 feet; thence N. 49° W. 1188.00 feet; thence N. 16° 45′ W. 924.00 feet; thence N. 5° 45′ E. 1782.00 feet; thence N. 7° E. 3498.00 feet; thence N. 1° 30′ E. 1782.00 feet to the Northerly line of Section 5, T. 27 N., R. 16 E., M.D.M.; thence continuing along the meander line of Honey Lake N. 1° 45′ W. 2310.00 feet; thence N. 7° 15′ W. 2970.00 feet; thence N. 9° 15′ W. 2706.00 feet; thence N. 10° 45′ W. 2640.00 feet; thence N. 10° 15′ W. 2376.00′; thence N. 9° 45′ W. 2970.00′ to the Northerly line of Section 20, T. 28 N., R. 16 E.; thence along the Northerly line of Section 20, East 2838.00 feet; thence S. 88° 28′ E. 5313.00 feet; thence S. 88° 58′ E. 2661.78 feet; thence S. 89° 02′ E. 2668.38 feet; thence S. 88° 54′ E. 2642.64 feet; thence S. 88° 57′ E. 2641.32 feet; thence S. 88° 54′ E. 1637.79′ to the South-Westerly line of the Southern Pacific Railroad R/W; thence S. 60° 18′ E. 2271.72 feet; thence S. 29° 42′ W. 74.976 feet; thence S. 60° 18′ E. 3108.864 feet; thence S. 89° 16′ E. 103.224 feet; thence S. 60° 18′ E. 1679.04 feet; thence N. 0° 56′ E. 28.512 feet; thence S. 60° 18′ E. 3007.62 feet to the East line of Section 19, T. 28 N., R. 17 E., M.D.M.; thence leaving said S.P. R.R. R/W along the East line of said Section 19, S. 0° 53′ W. 402.60 feet to

the S.E. corner of said Section 19; thence S. 0° 54′ W. 2647.26 feet; thence Easterly along the East West center line of Section 29, T. 28 N., R. 17 E., M.D.M. to the East line of said Section 29; thence Southerly along the East line of Sections 29 and 32, T. 28 N., R. 17 E., M.D.M. and the East line of Sections 5, 8, 17, 20, 29 and 32, T. 27 N., R. 17 E., M.D.M., to a point on the Northerly line of the Western Pacific R.R. R/W; thence Westerly along the Northerly line of said R/W to the Westerly line of Section 31, T. 27 N., R. 17 E., M.D.M.; thence Southerly along the Westerly line of said Section 31 to the South West corner thereof; thence continuing Southerly along the Easterly line of Section 1, T. 26 N., R. 16 E., M.D.M., to the South East corner thereof; thence Westerly along the Southerly line of said Section 1 to the South West corner thereof; thence Northerly along the Easterly line of Section 2, T. 26 N., R. 16 E., M.D.M. to the N.E. corner of the S.E.¼ of the S.E.¼ of said Section 2; [fol. 1136] thence Westerly along the Northerly line of the SE¼ of the SE¼ of said Section 2 to the North West corner thereof; thence Southerly along the Westerly line of the S.E.¼ of the S.E.¼ of said Section 2 to the Southerly line of said Section 2; thence Westerly along the Southerly line of said Section 2 to the South West corner thereof; thence Northerly along the Westerly line of said Section 2 to the N.W. corner thereof; thence Westerly along the Township line common to Section 3, T. 26 N., R. 16 E. and Section 34, T. 27 N., R. 16 E. to the Southwest corner of said Section 34 and the point of beginning. Containing 32,028.22 acres, more or less.

Excepting therefrom all that portion lying within the Western Pacific R.R. R/W.

Also excepting that portion described as commencing at the ¼ Section corner common to Sections 35, T. 27 N., R. 16 E., M.D.M. and Section 2, T. 26 N., R. 16 E., M.D.M.; thence running N. 0° 22′ 20″ E. 100.58 feet to the true point of beginning; thence from said point of beginning N. 89° 37′ 40″ W. 100.00 feet; thence N. 0° 22′ 20″ E. 100 feet; thence S. 89° 37′ 40″ E. 100.00 feet; thence S. 0° 22′ 20″ W. 100.00 feet to the point of beginning.

Parcel 2

All that real property situate in T. 28 N., R. 17 E., M.D.M., more particularly described as follows:

Beginning at the South West corner of the N.W.¼ of Section 21; thence Northerly along the line common to Sections 20 and 21 to the South East corner of the N.E.¼ of the N.E.¼ of said Section 20; thence Westerly along the Southerly line of the North ½ of the N.E.¼ of said Section 20 to the South West corner thereof; thence Northerly along the Westerly line of the N.W.¼ of the N.E.¼ of said Section 20 to the Northerly line of Section 20; thence Easterly along the Section line common to Sections 17 and 20 to the South East corner of Section 17; thence Northerly along the section line common to Sections 16 and 17 to the North East corner of the S.E.¼ of the S.E.¼ of Section 17; thence Westerly along the Southerly line of the N.E.¼ of the S.E.¼ of said Section 17 to the South West corner thereof; thence Northerly along the Westerly line of the N.E.¼ of the S.E.¼ of said Section 17 to the North West corner thereof; thence Westerly along the Southerly line of the North ½ of said Section 17 to the Westerly line thereof; thence Northerly along the Westerly line of said Section 17 to the N.W. corner thereof; thence Easterly along the Northerly line of said Section 17 to the North East corner of the N.W.¼ of said Section 17; thence Northerly along the Westerly line of the S.E.¼ of Section 8 to the N.W. corner of the S.E.¼ of said Section 8; thence Easterly along the Northerly line of the S.E.¼ of Section 8 and the Northerly line of the South half of Section 9 to the Easterly line of said Section 9; thence Southerly along the Easterly line of Section [fol. 1137] 9 and the Easterly line of Section 16 to the South East corner of said Section 16; thence Westerly along the Southerly line of said Section 16 to the South West corner of the S.E.¼ of said Section 16; thence Southerly along the Easterly line of the N.W.¼ of Section 21 to the South East corner thereof; thence Westerly along the Southerly line of the N.W.¼ of Section 21 to the South West corner thereof and the point of beginning.

Containing 1720 acres, more or less.

Parcel III

Leased County Road—Sierra Ord.

Beginning at a point on the Northerly right-of-way line of U. S. Highway 395 opposite Highway Engineer's Station 993 + 22.27 and running thence along a curve to the left with a radius of 200 feet, a central angle of 53° 49′ and a distance of 187.86 feet; thence North 72° 10′ East 9248.61 feet; thence on a curve to the left with a radius of 3925 feet, a central angle of 20° 45′ and a distance of 1421.46 feet; thence North 51° 25′ East 1261.68 feet; thence on a curve to the right with a radius of 3075 feet, a central angle of 25° 25′ and a distance of 1364.08 feet; thence North 77° 17′ East 8839.77 feet to a point on the Northerly line of Section 4, T. 26 N., R. 16 E., M.D.M.; thence along the Northerly line of said Section 4, Easterly 287.55 feet to the Northeast corner of said Section 4; thence along the Easterly line of said Section 4 Southerly 88.89 feet to a point; thence South 77° 17′ West 9117.63 feet; thence on a curve to the left with a radius of 2925 feet, a central angle of 25° 25′ and a distance of 1297.54 feet; thence South 51° 25′ West 1261.68 feet; thence on a curve to the right with a radius of 4075 feet, a central angle of 20° 45′ and a distance of 1475.78 feet; thence South 72° 10′ West 9183.92 feet; thence on a curve to the left with a radius of 175 feet and a central angle of 107° 50′ and a distance of 188.20 feet to a point on the Northerly right of way line of U. S. Highway 395 opposite State Highway Engineer's Station 998 + 29.91; thence North 54° 01′ West 506.94 feet to the point of beginning.

Containing 76.29 acres, more or less.

[fol. 1138] PLAINTIFF'S EXHIBIT No. 9

DEPARTMENT OF THE ARMY
WASHINGTON 25, DC

5 July 1950

Colonel Rufus W. Putnam
Executive Officer, State Lands Commission
301 State Building
Los Angeles, California

Dear Colonel Putnam:

AMENDED APPLICATION FOR PUBLIC HEARING
RE: OAKLAND ARMY BASE

Pursuant to the provisions of the law of the State of California, Section 126 of the California Government Code, see also Chapter 1532, Statutes of California 1947 and in accordance with the rules and regulations governing conditions and procedures thereunder, adopted by the State Lands Commission on 14 June 1949, the Department of the Army hereby requests a public hearing by the Commission to determine whether the conditions and reservations with respect to the consent of acquisition by the United States of the following described land in the State of California have been met:

Three parcels of land comprising 600.139 acres, more or less, in the City of Oakland, County of Alameda, State of California, used in connection with a military reservation officially designated Oakland Army Base.

The main parcel of 594.25 acres, more or less, being bounded on the north by the San Francisco-Oakland Bay Bridge Approach road, on the east by the Southern Pacific Railroad, on the south by 7th Street, and on the west by Maritime Street and the waters of the Bay of San Francisco.

Two small parcels lie to the east, one containing 2.499 acres, more or less, located between 22nd and 26th Streets and the other containing 3.39 acres, more or less, located between 10th and 13th Streets.

A legal description of the land and map are enclosed.

The Department of the Army, in behalf of the United States of America, hereby assents to acceptance of federal jurisdiction over the subject lands as provided by Section 355, Revised Statutes, as amended by the Act of 1 February 1940, 54 Stats. 19, and by the Act of Congress 9 October 1940, 54 Stats. 1083; 40 USC 255, upon and subject to each and all of the conditions and reservations [fol. 1139] described in said California Government Code, Section 126, as follows:

1. The subject land was acquired by the United States for one of the purposes enumerated in Article 1, Section 8, Clause 17 of the Constitution of the United States, to wit, for military purposes.

2. The land was acquired pursuant to and in compliance with the Act of Congress approved 2 July 1917, 50 USC 171, 40 Stats. 241, and by an Act of Congress approved 27 March 1942, 50 USC, Appendix 632, 56 Stats. 176.

3. The acquisition of the subject lands is in the interest of California as well as of the United States.

4. The State reserves the right to serve civil and criminal proven process in all cases and the entire power of taxation, including that of each State Agency, County, City, City and County, political subdivision or public district of or in the State and reserves to all persons residing on such land all civil and political rights including the right of suffrage which they might have were the consent of the State not given.

5. The jurisdiction shall continue only so long as the land continues to belong to the United States and is held by it in accordance with and in compliance with the conditions and reservations set forth in Section 126 of the California Government Code.

6. The United States agrees to bear the cost of publication of notice of hearing once in a newspaper of general circulation in Alameda County and the service of such notice upon the Clerk of the Board of Supervisors of such county. A representative of the Office of the Division

Engineer, Corps of Engineers, South Pacific Division, Oakland Army Base, Oakland, California, will attend the hearing and present the necessary evidence in support of this application.

When the Commission has made the necessary declaration and findings and certified copies thereof have been filed in the Office of the California Secretary of State and recorded in the office of the County Recorder of Alameda County, California as required by said Section 126 of the California Government Code, it will be appreciated if you will furnish the person representing the Federal Government a certified copy of the order or resolution as filed and recorded.

Sincerely yours,

/s/

Frank Pace, Jr.
Secretary of the Army

[fol. 1140]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. 1461

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of item 32 of the minutes of the meeting of the State Lands Commission held on October 5, 1950, in Los Angeles, on file in the office of the State Lands Commission; that said document has been compared by the undersigned with the original, and is a correct transcript therefrom.

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 31st day of October A. D. 1950.

/s/ RUFUS W PUTNAM
(TITLE) EXECUTIVE OFFICER
STATE LANDS COMMISSION

(Seal)

[fol. 1141] 32. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY THE UNITED STATES ARMY AT OAKLAND ARMY BASE, ALAMEDA COUNTY, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126, GOVERNMENT CODE — W.O. 490) The Commission was informed as follows: On July 26, 1949, the Commission authorized the Executive Officer to order and conduct the requisite hearings pursuant to Section 126 of the Government Code and under the rules and regulations adopted by the Commission on June 14, 1949, on applications for consent to acquisition by the United States of lands comprising a number of installations among which was the United States Army Base at Oakland, California. Under date of April 21, 1949, an application for acceptance of jurisdiction by the United States executed by Kenneth C. Royall, Secretary of the Army, was addressed to Governor Earl Warren and forwarded to this office. This application was deficient in several aspects and was subsequently replaced by a corrected application filed by Mr. Frank Pace, Jr., Secretary of the Army, under date of July 5, 1950.

Pursuant to said application arrangements were made to conduct the public hearing at Oakland, California, in connection with one scheduled for the same day and place and relating to the United States Army Personnel Center at Camp Stoneman. The Notice of such Public Hearing was published in the Oakland Tribune, Oakland, California, on August 14, 1950, and service on the Clerk of the Board of Supervisors of Alameda County was made on August 10, 1950. Notices were thus published and served in compliance with Section 2702 California Administrative Code, Title 2.

A hearing was held by the Executive Officer at the Oakland Army Base, Oakland California, at 10:00 A.M., August 30, 1950. A record of the hearing was made and the transcript was made a part of the Commission record in this case. The Attorney General was represented by Mr. Walter S. Rountree, Deputy Attorney General.

Appearances were made on behalf of the Army by the Commanding Officer of the Oakland Army Base, Colonel Robert L. Allen, also by Mr. Robert Prendergast, George

Lavezzola and Mr. J. Otis Brown, representing the Real Estate Section of the Southern Pacific Division of the Corps of Engineers, U. S. Army. No other appearances were made in support of this application and none were made against it.

Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain [fol. 1142] specified conditions. Oral and documentary evidence were presented at the hearing in support of the contention of the applicant that these conditions have been met and complied with. Conclusions in regard to their presentation are as follows:

As applied to this case the acquisition "must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purposes within the purview of Clause 17, Section 8 of Article 1 of the Constitution of the United States". According to evidence received, the Oakland Army Base, a component part of the San Francisco Port of Embarkation, maintains cargo terminal facilities for port operations, including piers, pier sheds, warehouses, administrative offices, billets, roads, grounds, and railroad trackage. It is a permanent part of the national defense system. Therefore, it is believed that the lands for this installation were acquired for purposes within the above-quoted portion of the Constitution of the United States and are presently maintained for such purposes.

The second condition requires that a finding must be made that "the acquisition must be pursuant to and in compliance with the laws of the United States". Evidence in support of this condition was presented in the form of reference to certain United States statutes. The lands were acquired under an authority of an Act of Congress approved July 2, 1917, 50 U. S. Code, 171, 40 Stat. 241, and an Act of Congress approved March 27, 1942, 50 U. S. Code, Appendix 632, 56 Stat. 176, commonly known as the First and Second World War Powers Act. Condemnation proceedings were pursuant to an Act of Congress approved August 18, 1890, 26 Stat. 316.

Immediate possession was had pursuant to an Act of Congress approved February 26, 1931, 40 U. S. Code, Section 258-A, 46 Stat. 1421.

Evidence was presented by Mr. Robert M. Prendergast, a Land Acquisition Attorney for the Corps of Engineers, Department of the Army, to the effect that with the exception of a parcel of submerged land of approximately 122 acres, identified as Tract 14, Parcel 3, all of the lands described in the application of the Secretary of the Army have been acquired pursuant to and in compliance with the laws of the United States and that the latter is now possessed of good and sufficient fee title to them. As to the excepted lands, Tract 14, Parcel 3, possession is had by the United States pursuant to a contract for the acquisition of title and to an agreement under condemnation proceeding Civil No. 21758-L; however, title in fee has not passed to the United States.

The third condition upon which a finding is required is to the effect that "the United States must in writing have assented to acceptance of jurisdiction over the lands upon and subject to each and all of the conditions and reservations in this section prescribed". Under the provisions of an Act of Congress of October 9, 1940, Public Law 825 "the head or other authorized officer of any department of the Government" may accept jurisdiction from the State. A letter from the Department of the Army dated July 5, 1950, accepting jurisdiction on behalf of the United States and signed by Mr. Frank Pace, Jr., Secretary of the Army, was received by the Division of State Lands on July 26, 1950. This acceptance is made subject to each and all of the conditions and reservations prescribed in Section 126, Government Code, State of California and is, therefore, in accordance with law and with the rules of the Commission.

[fol. 1143] The fourth requirement is that the Commission must have found and declared that such acquisition is in the interest of the State. Testimony was received that the Oakland Army Base provides employment for approxi-

mately five thousand persons, military and civilians, some of whom reside on the base and others live in Oakland and other adjacent cities. Its maintenance and operation require the use of a large amount of material and equipment, much of which is purchased locally or elsewhere in the State. It thus is of distinct economic benefit. The Base is an important military installation, supplying the Pacific frontiers of this nation with essentials for its protection. As a Pacific Coast state, California is more directly exposed to attacks from the west than is the interior of this country. It is, therefore, believed that this acquisition is in the interest of the State.

It is concluded that all four conditions requisite to a declaration of the State Lands Commission have thus been met, with the exception of the parcel of submerged lands previously referred to. These lands have been eliminated from the proposed declaration by appropriate amendments to the description of the area of lands appearing in the following resolution:

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, THE STATE LANDS COMMISSION DETERMINES WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED AND NOW USED BY THE DEPARTMENT OF THE ARMY OF THE UNITED STATES FOR THE OAKLAND ARMY BASE IN ALAMEDA COUNTY, CALIFORNIA, SAID LANDS BEING DESCRIBED AS FOLLOWS:

PARCEL 1:

A portion of the Outer Harbor and the North Industrial Area of the City of Oakland, containing 472.25 acres, more or less, and more particularly described as follows:

BEGINNING at the point of intersection of the "Agreed Low Tide Line of 1852" as said Line is agreed upon and located by Ordinance 3099 of the City of Oakland, adopted 7 July 1910, certified copy of which Ordinance is recorded in Book 1837 of Deeds, at Page 91, Records of Alameda County, with the north line of Seventh Street; said point of beginning being North 39° 50′ 03″ East

95.35 feet (Record bearing for "Agreed Low Tide Line" being 39° 51′ 40″) along said "Agreed Low Tide Line of 1852" from a concrete monument with a pipe and copper plug at the intersection of said "Agreed Low Tide Line of 1852," and the southerly boundary of Seventh Street; thence from said point of beginning along the northerly line of Seventh Street North 83° 06′ 00″ West 123.95 feet to a point on a line parallel with and 104 feet Westerly, measured at right angles from the aforesaid "Agreed Low Tide Line of 1852", said point also being the westerly line of that certain Street designated as Maritime Street; thence North 39° 50′ 03″ East 3596.81 feet along said parallel line and said westerly line of Maritime Street to a point, said point being described as North 30° 10′ 30″ East 618.89 feet from a brass plug located on the "Agreed Low Tide Line of 1852," distant thereon 36.03 feet from the intersection of the "Agreed Low Tide Line" and the south line of 14th Street; continuing thence along said parallel line and westerly line of Maritime Street North 39° 50′ 03″ East 831.56 feet; thence leaving said parallel line and westerly line of Maritime Street North 83° 07′ 37″ West 519.37 feet; thence North 06° 52′ 23″ East 936.49 feet; thence South 85° 37′ 43″ West 500.27 feet; thence South 58° 22′ 53″ West 589.58 feet; thence North 76° 37′ 37″ West 983.21 feet; thence South 48° 24′ 51″ West 978.73 feet; thence North 41° 34′ 18″ West 539.98 feet to Pierhead Point No. 44, as said pierhead point is shown on Sheet No. 5 of that certain map in 8 sheets entitled "Harbor Lines, San Francisco Bay, California, Oakland-Alameda" prepared by U.S. Engineer Office, San Francisco, California, [fol. 1144] dated 19 September 1940 and approved 31 March 1941, by the Secretary of War; thence from said Pierhead Point No. 44 and running along said pierhead line as shown on the above-mentioned maps South 29° 57′ 49″ West 1610.00 feet to Pierhead Point No. 43; thence continuing along that pierhead line South 81° 0′ 42″ West 1869.87 feet to the most westerly point of that certain parcel of land described as parcel 1 in that deed between the City of Oakland, a municipal corporation

of the State of California, acting by and through its Board of Port Commissioners and the United States of America dated 23 July 1943 and recorded 23 July 1943 in Volume 4404 of Official Records at page 17; thence leaving said pierhead line and running along the westerly line of the above described parcel 1, north 39° 35′ 58 east 2031.77 feet and north 9° 33′ west 674.05 feet to a point on the south line of the San Francisco-Oakland Bay Bridge Approach Road; thence running along the said southerly line of the San Francisco-Oakland Bay Bridge Approach north 80° 26′ 49″ east 340.05 feet; thence North 86° 57′ 16″ East 373.46 feet; thence North 80° 25′ 12″ East 3746.90 feet; thence leaving said line, North 63° 04′ 21″ East 397.80 feet; thence North 70° 35′ 26″ East 439.77 feet to a point on the northern line of the City of Oakland as of 1862 and commonly known as the Charter Line of the City of Oakland; said point being North 63° 45′ 59″ West 1278.652 feet from the intersection of the northern line of 34th Street as said street is located and described in Ordinance No. 2747 N.S. of the City of Oakland adopted 19 October 1923; said point also being on the southerly line of that parcel of land designated as Parcel 3 in an agreement between the Railway Equipment and Realty Company, Ltd., et al., and the Atchison, Topeka and Santa Fe Railway Company. dated 24 September 1942; thence along said line North 71° 03′ 51″ East 743.58 feet; thence North 75° 37′ East 630.05 feet to a point, said point being South 75° 37′ West 2,156.71 feet from the most easterly corner of the Parcel of land designated as Parcel 3 in an Agreement between Railway Equipment and Realty Company, Ltd., et al., and the Atchison, Topeka and Santa Fe Railway Company dated 24 September 1942; thence leaving said southerly line of Parcel 3, South 14° 23′ East 303.74 feet; thence North 75° 37′ East 435.00 feet; thence South 14° 23′ East 235.00 feet; thence North 75° 31′ 09″ East 1,523.81 feet; thence North 55° 34′ 22″ East 216.58 feet; thence North 36° 09′ 18″ East 80.11 feet; thence on a curve to the left tangent from a course that bears South 8° 18′ 15.5″ West with a radius of 10,617.97 feet through a central angle of 1° 27′ 21″ an arc distance of 269.79

feet to a point on the southwesterly line of the parcel of land designated as Parcel 2 in the Deed from Wells Fargo Bank & Union Trust Company, et al., to the State of California, dated 11 June 1935, and recorded 17 August 1935 in Book 3194 of Official Records, Page 342, records of Alameda County; thence South 59° 19′ East 81.94 feet to the point of intersection with the westerly line of the Southern Pacific Company's 100-foot right-of-way for tracks; thence leaving said southwesterly line of the aforementioned Parcel 2 and along westerly line of said Southern Pacific Company's right-of-way on the arc of a curve to the right, with a radius of 10,692.97 feet an arc distance of 238.58 feet; continuing thence along the arc of a curve to the right with a radius of 7,598.45 feet an arc distance of 539.23 feet; continuing thence along an arc of a curve to the right with a radius of 7,111.99 feet an arc distance of 111.301 feet to the point of intersection of the westerly line of the Southern Pacific Company's 100-foot right-of-way and the southerly line of 34th Street as said Street is so described in the Records of the City of Oakland; thence South 75° 37′ West 84.80 feet along the southerly line of 34th Street to a point; said point being South 75° 37′ West 479.78 feet from the southwest corner of 34th Street and Wood Street; thence leaving said southerly line of 34th Street, South 23° 31′ 55″ West 518.61 feet to a point, from which point the center of an arc having a radius of 434.68 feet bears North 07° 41′ 37.5″ West; thence along said arc on a curve to the right with a radius of 434.68 feet an arc distance of 46.26 feet to the beginning of a curve to the right with a radius of 697.26 feet whose center bears North 01° [fol. 1145] 35′ 47.5″ West; thence along said curve to the right with a radius of 697.26 feet an arc distance of 242.48 feet to a point; thence North 71° 40′ 17″ West 584.65 feet to a point on the southerly line of the aforementioned 34th Street; thence along the southerly line of said 34th Street South 78° 47′ West 141.95 feet; thence leaving said southerly line of 34th Street, South 71° 40′ 17″ East 585.40 feet; thence South 73° 43′ 35.5″ East 182.13 feet; thence South 78° 10′ 57″ East 90.655; thence

South 74° 52′ 42″ West 136.19 feet to a point on the northwesterly property line of the Southern Pacific Company; thence along said property line South 16° 15′ 42″ West 105.51 feet to a point, said point being the southwesterly terminus of a course bearing South 16° 15′ 42″ West and having a length of 122.64 feet, as described in an indenture dated 20 January 1940 from Southern Pacific Railroad Company to the State of California recorded in Book 4015 of Official Records, at page 159, records of Alameda County; thence from said point northwesterly on the arc of a curve tangent to a line which bears North 62° 11′ 29″ East, concave northeasterly, having a radius of 682.888 feet, through a central angle of 9° 28′ 48″ an arc distance of 112.98 feet to a point, said point being the most northeasterly corner of that parcel of land described as Parcel 2 in the deed from the Southern Pacific Company to the United States of America, dated 7 July 1941 and recorded 6 October 1941, Book 4121 of Official Records, at Page 191, Records of Alameda County; thence along the easterly line of the above-mentioned Parcel 2, South 29° 48′ 45″ West 1,044.18 feet to the northerly line of 22nd Street as said street is delineated and so designated upon the Official Maps of the City of Oakland; thence westerly along the northerly line of 22nd Street, North 57° 39′ 19″ West 1718.58 feet to a point on the "Agreed Low Tide Line of 1852"; thence along said "Agreed Low Tide Line of 1852" South 39° 50′ 03″ West 80.47 feet to a point on the southerly line of said 22nd Street; thence along the southerly line of 22nd Street South 57° 39′ 19″ East 1713.37 feet to the most northeasterly corner of Parcel 1, described in the deed from the Southern Pacific Company to the United States of America, above referred to; thence along the easterly line of said Parcel 1, as referred to, South 43° 30′ West 2544.13 feet to a point on the northerly line of 14th Street, as said street now exists and as said street is designated upon the Official Maps of the City of Oakland; thence along the northerly line of said 14th Street North 83° 05′ 20″ West 1832.41 feet to its intersection with the "Agreed Low Tide Line of 1852"; thence along the "Agreed Low Tide Line of 1852" South 39° 50′ 03″ West 95.78

feet to a point on the southerly line of 14th Street; thence along the southerly line of 14th Street South 83° 05′ 20″ East 1824.89 feet to a point on the most northeasterly corner of that parcel of land described in the deed from the Southern Pacific Company to the United States of America dated 2 March 1942 and recorded 2 March 1942 in Book 4189 of Official Records, at Page 197, Records of Alameda County; thence along the easterly line of said parcel of land South 43° 30′ West 302.51 feet; thence South 49° 14′ West 2859.64 feet to a point in the northerly line of Parcel A, described in the deed between the Southern Pacific Company and the City of Oakland, dated 23 December 1930 and recorded 29 December 1930 in Book 2505 of Official Records, at page 251, Records of Alameda County; thence North 52° 35′ 08″ West 1047.74 feet to a point on the "Agreed Low Tide Line of 1852"; thence along the "Agreed Low Tide Line of 1852" South 39° 50′ 03″ West 804.64 feet to the point of beginning.

PARCEL 2:

That parcel of land lying within the City of Oakland containing 2.499 acres, more or less, and more particularly described as follows:

That portion of the "Hougham Tract" as said tract is [fol. 1146] shown on the "Map of the Hougham Tract," filed 10 June 1875 in Book 4 of Maps at Page 8, in the Office of the County Recorder of Alameda County, described as Beginning at a point on the northeastern line of 22nd Street, 80 feet in width, distant thereon North 57° 41′ 26″ West 157.33 feet from the northwestern line of Wood Street, as said last street is shown on said map, said point of beginning being the intersection of said line of 22nd Street with the southeastern line of the land described as Parcel No. 2 in the deed from the California, Arizona and Santa Fe Railway Company to the State of California, dated 23 February 1940, recorded 18 December 1940 in Book 4015 of Official Records, at page 155, Records of Alameda County; thence from said point of beginning North 21° 14′ 19″ East 199.292 feet;

thence North 57° 41′ 26″ West 0.72 feet; thence North 17° 43′ 57″ East 58.50 feet; thence North 24° 14′ 42″ East 292.36 feet to a point on the southwesterly line of 24th Street, distant thereon North 57° 41′ 26″ West 251.32 feet from the said northwesterly line of Wood Street; continuing thence North 24° 14′ 42″ East 33.89 feet; thence tangent to the last course on the arc of a curve concave northwesterly having a radius of 4600.69 feet; through an angle of 1° 52′ 06″ a distance of 150.02 feet to a point of reverse curvature; thence from a tangent that bears North 22° 22′ 36″ East, northeasterly on the arc of a curve concave southeasterly, having a radius of 655.75 feet, through an angle of 11° 26′ 46″ a distance of 131.00 feet; thence North 24° 01′ 56″ East 15.00 feet; thence North 6° 59′ 30″ West 45.22 feet; thence from a tangent that bears North 20° 04′ 32″ East, northeasterly on the arc of a curve concave northwesterly having a radius of 4595.69 feet, through a central angle of 0° 17′ 23″ a distance of 23.24 feet to a point of compound curvature; thence from a tangent that bears North 19° 47′ 09″ East northeasterly on the arc of a curve concave northwesterly having a radius of 3984.56 feet, through an angle of 0° 58′ 57″ a distance of 68.32 feet; thence from a tangent that bears South 17° 12′ 43″ East, southeasterly on the arc of a curve concave southwesterly having a radius of 509.68 feet, through an angle of 23° 24′ 10″ a distance of 208.18 feet; thence from a tangent that bears South 6 11′ 27″ west southwesterly on the arc of a curve concave northwesterly, having a radius of 685.10 feet, through an angle of 27° 33′ 14″ a distance of 329.47 feet; thence South 33° 44′ 42″ West 510.985 feet to the point of beginning.

PARCEL 3:

That parcel of land situate in the City of Oakland containing 3.39 acres, as described in the deed from The Anglo California National Bank of San Francisco to the United States of America, dated 5 May 1941, recorded 6 May 1941 in Volume 4076 of Official Records, at page 31, Records of Alameda County, and being more particularly described as follows:

Beginning at a point on the northeasterly line of 10th Street distant thereon North 57° 56′ West 190 feet from the northwesterly line of Pine Street, as said street is shown on that certain map entitled "Map of the City of Oakland Showing Plan of Streets, as Adopted by the City Council 16 November 1868, and approved," filed 22 June 1908 in Book 24 of Maps, at Page 15, in the Office of the County Recorder of Alameda County; thence along said northeasterly line of 10th Street, North 57° 56′ West 170 feet, more or less, (surveyed as 160.82 feet) to the southeastern line of the right-of-way of the Southern Pacific Railroad Company; thence northeasterly along the northeasterly line of said railroad right-of-way 1043.11 feet, more or less, to the projection of the center line of 13th Street as said street now exists; thence South 57° 56′ East 140 feet, more or less, (surveyed as 141.30 feet) to the projection of the northwesterly line of Pine Street; thence South 32° 04′ West along said last line 29.25 feet to a point on the southeasterly line of 13th Street projected northwesterly; thence along said southeasterly line of 13th Street, South 57° 56′ East 60 feet to the south- [fol. 1147] eastern line of Pine Street; thence southwesterly along the southeasterly line of said Pine Street, South 32° 04′ West 260 feet (surveyed as 260.75 feet) to the northeasterly line of 12th Street; thence along the northwesterly prolongation of the northeasterly line of said 12th Street, North 57° 56′ West 60 feet to a point on the northwesterly line of the above-mentioned Pine Street; thence southwesterly along the northwesterly line of said Pine Street, South 32° 04′ West 340 feet, more or less, to the northeasterly line of 11th Street; thence along said line of 11th Street, and the projection thereof North 57° 56′ West 250 feet, more or less, to the Peralta Grant Line, as said line is described in the deed from Pacific Improvement Company and The Oakland Water Front Company to Pacific Coast Canning Company, dated 13 February 1912 and recorded 23 February 1912 in Volume 2020 of Deeds, at Page 254, Records of Alameda County; thence along said Peralta Grant Line South 55° 00′ West 64.06 feet to the southwestern line of 11th Street; thence along

said southwestern line of 11th Street South 57° 56′ East 83.00 feet, more or less, to a point 190 feet from the northwesterly line of Pine Street; thence South 32° 04′ West 270.00 feet, more or less, to the point of beginning.

THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS (a), (b) AND (c) OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALIFORNIA HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST AND THAT SUCH ACQUISITION IS IN THE INTEREST OF THE STATE; THE STATE LANDS COMMISSION DIRECTS THE EXECUTIVE OFFICER TO FILE CERTIFIED COPIES OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE AND TO HAVE THEM RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE COUNTY OF ALAMEDA.

[fol. 1149] PLAINTIFF'S EXHIBIT No. 10

DEPARTMENT OF THE ARMY

WASHINGTON 25, D.C.

(Seal)

IN REPLY REFER TO: Jun 30 1950

Colonel Rufus W. Putnam
Executive Officer, State Lands Commission
301 State Building
Los Angeles, California

Dear Colonel Putnam:

AMENDED APPLICATION FOR PUBLIC HEARING
RE: CAMP STONEMAN

Pursuant to the provisions of the law of the State of California (Section 126 of the California Government Code; see also chap. 1532, Statutes of Calif. 1947) and in accordance with the rules and regulations governing conditions and procedures thereunder adopted by the State Lands Commission on 14 June 1949, the Department of the Army

hereby requests a public hearing by the Commission to determine whether the conditions and reservations respecting consent to the acquisition by the United States of the following described land in the State of California have been met:

> Seven parcels of land comprising 1840.46 acres, more or less, located in Township 2 North, Ranges 1 East and 1 West, Mount Diablo Base and Meridian, Contra Costa County, California, used in connection with a military reservation officially designated Camp Stoneman, said parcels being Camp Stoneman proper, the Rifle Range, Wharf Facilities Area, Sewage Disposal Site, Reservoir Site, and two small railroad spur track sites. The camp proper is bounded by California Avenue (a county road) on the north, Pittsburg Railroad (abandoned) on the east, Contra Costa Canal on the South, and Kirker Road on the west, with all other parcels located near-by except the Wharf Facilities Area, which is located on New York Slough near Harbor Street and the Atchison, Topeka and Santa Fe Railroad right-of-way in the City of Pittsburgh. Said lands having been acquired by the United States of America by deeds dated 7 January 1943, recorded in Book 652, Page 40; 18 March 1943, recorded in Book 700, Page 86; 6 April 1943, recorded in Book 739, Page 438; 25 January 1947, recorded in Book 903, Page 244, official records of Contra Costa County, California; and by Condemnation Actions in the U. S. District Court for the Southern Division, Northern District of California, as follows: Civil No. 22073-R, filed 17 February 1943; Civil No. 22654-S, filed 3 June 1943; Civil No. 27368-H, filed 25 June 1947; and Civil No. 27367-R, filed 13 June 1947.

A legal description and map of the land are inclosed.

The Department of the Army, in behalf of the United [fol. 1150] States of America, hereby assents to acceptance of federal jurisdiction over the subject land as provided by section 355, Revised Statutes, as amended by the act of 1 February 1940 (54 Stat. 19) and by the act of 9 October 1940 (54 Stat. 1083; 40 U.S.C. 255), upon and subject to

each and all of the conditions and reservations prescribed in said California Government Code section 126, as follows:

1. The subject land was acquired by the United States for one of the purposes enumerated in article I, section 8, clause 17, of the Constitution of the United States, to-wit: For military purposes.

2. The land was acquired pursuant to and in compliance with an act of Congress approved 2 July 1917 (50 U.S.C. 171; 40 Stat. 241) and by an act of Congress approved 27 March 1942 (50 U.S.C. App. 632; 56 Stat. 176).

3. The acquisition of the subject land is in the interest of the State of California as well as of the United States.

4. The State reserves the right to serve civil and criminal process in all cases, and the entire power of taxation, including that of each state agency, county, city, city and county, political subdivision or public district of or in the state, and reserves to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were the consent of the State not given.

5. The jurisdiction accepted herein shall continue only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with the conditions and reservations set forth in said section 126 of the California Government Code.

6. The United States agrees to bear the cost of publication of the notice of public hearing once in a newspaper of general circulation in Contra Costa County and the service of such notice upon the Clerk of the Board of Supervisors of said county.

A representative of the office of the Division Engineer, Corps of Engineers, South Pacific Division, Oakland Army Base, Oakland, California, will attend the hearing and present the necessary evidence in support of this application.

When the Commission has made the necessary findings and declarations and certified copies thereof have been filed in the office of the California Secretary of State and re-

[fol. 1151] corded in the office of the County Recorder of Contra Costa County, California, as required by said section 126 of the California Government Code, it will be appreciated if you will furnish the person representing the Federal Government a certified copy of the order or resolution as filed and recorded.

Sincerely yours,

/s/ FRANK PACE, JR.
Frank Pace, Jr.
Secretary of the Army

2 Incls.
1. Description (quad)
2. Map (quad)

[fol. 1152]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. 1458

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of item 33 of the minutes of the meeting of the State Lands Commission held in Los Angeles on October 5, 1950, on file in the office of the State Lands Commission; that said document has been compared by the undersigned with the original, and is a correct transcript therefrom.

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 18th day of October A. D. 1950.

/s/ RUFUS W. PUTNAM
(Title) Executive Officer
State Lands Commission

(Seal)

[fol. 1153] 33. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY THE UNITED STATES ARMY PERSONNEL CENTER AT CAMP

STONEMAN, CONTRA COSTA COUNTY, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126, GOVERNMENT CODE—W.O. 489) The Commission was informed as follows: On July 26, 1949, the Commission authorized the Executive Officer to order and conduct the requisite hearings pursuant to Section 126 of the Government Code and under the rules and regulations adopted by the Commission on June 14, 1949, on applications for consent to acquisition by the United States of lands comprising a number of installations among which was the United States Army Personnel Center at Camp Stoneman. Under date of April 21, 1949, an application for acceptance of jurisdiction by the United States executed by Kenneth C. Royall, Secretary of the Army, was addressed to Governor Earl Warren and forwarded to this office. This application was deficient in several aspects and was subsequently replaced by a corrected application filed by Mr. Frank Pace, Jr., Secretary of the Army, under date of June 30, 1950.

Pursuant to said application arrangements were made to conduct the public hearing at Oakland, California, in connection with one scheduled for the same day and place and relating to the Oakland Army Base. The Notice of such Public Hearing was published in the Contra Costa Gazette, Martinez, California, on August 14, 1950, and service on the Clerk of the Board of Supervisors of Contra Costa County was made on August 12, 1950. Notices were thus published and served in compliance with Section 2702 California Administrative Code, Title 2.

A hearing was held by the Executive Officer at the Oakland Army Base, Oakland, California, at 10:00 A. M., August 30, 1950. A record of the hearing was made and the transcript was made a part of the Commission record in this case. The Attorney General was represented by Mr. Walter Rountree, Deputy Attorney General. Appearances were made on behalf of the Army by the Commanding Officer of the Camp Stoneman Personnel Center, Colonel Thomas J. [fol. 1154] Jenkins, also by Mr. Robert Prendergast, Mr. George Lavezzola and Mr. J. Otis Brown, representing the Real Estate Section of the Southern Pacific Division of the Corps of Engineers, U.S. Army. No other appearances were made in support of this application and none were made against it.

Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain specified conditions. Oral and documentary evidence were presented and received at the hearing in support of the contention of the applicant that these conditions have been met and complied with. Conclusions in regard to their presentation are as follows:

As applied to this case the acquisition "must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purposes within the purview of Clause 17, Section 8 of Article 1 of the Constitution of the United States". According to evidence received, the United States Army Personnel center at Camp Stoneman was established in 1942 as a staging area for the San Francisco Port of Embarkation and was utilized as such throughout World War II. It has continued to serve in that capacity since that time and is now receiving housing, processing and shipping army personnel going to or returning from the Pacific Theater. It is a permanent Army installation and includes permanent buildings for the housing of troops and other needful structures such as warehouses and wharves. It is, therefore, believed that the lands for this installation were acquired for purposes within the above-quoted portion of the Constitution of the United States and are presently maintained for such purposes.

The second condition requires that a finding must be made that "the acquisition must be pursuant to and in compliance with the laws of the United States".

Evidence in support of this condition was presented in the form of reference to certain United States statutes. The lands were acquired under an authority of an Act of Congress approved July 2, 1917, 50 U. S. Code, 171, 40 Stat. 241, and an Act of Congress approved March 27, 1942, 50 U.S. Code, Appendix 632, 56 Stat. 176, commonly known as the First and Second World War Powers Act. Condemnation proceedings were pursuant to an Act of Congress approved August 18, 1890, 26 Stat. 316. Immediate possession was had pursuant to an Act of Congress approved February 26, 1931, 40 U. S. Code, Section 258-A, 46 Stat.

1421. Additional evidence was presented by Mr. Robert M. Prendergast, a Land Acquisition Attorney for the Corps of Engineers, Department of the Army, that the acquisition was pursuant to and in compliance with the laws of the United States and that the United States is now possessed of good and sufficient fee title to the lands involved.

The third condition upon which a finding is required is to the effect that "the United States must in writing have assented to acceptance of jurisdiction over the lands upon and subject to each and all of the conditions and reservations in this section prescribed". Under the provisions of an Act of Congress of October 9, 1940, Public Law 825 "the head or other authorized officer of any department of the Government" may accept jurisdiction from the State. A letter from the Department of the Army dated June 30, 1950, accepting jurisdiction on behalf of the United States and signed by Mr. Frank Pace, Jr., Secretary of the Army, was received by the Division of State Lands on July 12, 1950. This acceptance is made subject to each and all of the conditions and reservations prescribed in Section 126, Government Code, State of California and is, therefore, in accordance with law and with the rules of the Commission.

[fol. 1155] The fourth requirement is that the Commission must have found and declared that such acquisition is in the interest of the State. According to testimony received, the Personnel Center at Camp Stoneman employs a large number of civilians permanently and houses temporarily, even greater numbers of military personnel all of whom through local purchases and otherwise contribute materially to the economy of the State. The installation is an integral and an important part of the national defense program and it is in the interest of the State.

It is concluded that all four conditions requisite to a declaration of the State Lands Commission have thus been met.

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, THE STATE LANDS COMMISSION DETERMINES, WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED AND NOW USED BY THE DEPARTMENT OF THE ARMY OF THE UNITED

STATES FOR THE CAMP STONEMAN PERSONNEL CENTER IN CONTRA COSTA COUNTY, CALIFORNIA, SAID LANDS BEING DESCRIBED AS FOLLOWS:

Seven parcels of land comprising 1840.46 acres, more or less, located in Township 2 North, Ranges 1 East and 1 West, Mount Diablo Base and Meridian, Contra Costa County, California, used in connection with a military reservation officially designated Camp Stoneman, said parcels being Camp Stoneman proper, the Rifle Range, Wharf Facilities Area, Sewage Disposal Site, Reservoir Site, and two small railroad spur track sites. The Camp proper is bounded by California Avenue (a county road) on the north; Pittsburg Railroad (abandoned) on the east, Contra Costa Canal on the South, and Kirker Road on the west, with all other parcels located near-by except the Wharf Facilities Area, which is located on New York Slouth near Harbor Street and the Atchison, Topeka and Santa Fe Railroad right-of-way in the City of Pittsburgh. Said lands having been acquired by the United States of America by deeds dated 7 January 1943, recorded in Book 652, Page 40; 18 March 1943, recorded in Book 700, Page 86; 6 April 1943, recorded in Book 739, Page 438; 25 January 1947, recorded in Book 903, Page 244, Official records of Contra Costa County, California; and by Condemnation Actions in the U. S. District Court for the Southern Division, Northern District of California, as follows: Civil No. 22073-R, filed 17 February 1943; Civil No. 22654-S, filed 3 June 1943; Civil No. 27368-H, filed 25 June 1947; and Civil No. 27367-R, filed 13 June 1947;

THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS (a), (b) AND (c) OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALIFORNIA HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST AND THAT SUCH ACQUISITION IS IN THE INTEREST OF THE STATE; THE STATE LANDS COMMISSION DIRECTS THE EXECUTIVE OFFICER TO FILE CERTIFIED COPIES OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE AND

TO HAVE THEM RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE COUNTY OF CONTRA COSTA.

[fol. 1156] PLAINTIFF'S EXHIBIT No. 11

(Letterhead of State Lands Commission, Los Angeles, California)

REFER TO FILE NO.
W.O.481; your
file Nl-13
7802-jm/wg
(250) (5490)

January 15, 1951.

J. L. McNally, Esq.,
Real Estate Board,
District Public Works Office,
Twelfth Naval District,
Federal Office Building,
San Francisco 2, California.

re: Naval Supply Depot, Oakland

Dear Mr. McNally:

I am enclosing one certified copy of the minutes of the meeting of the State Lands Commission of December 18, 1950, pertaining to acquisition by the United States of jurisdiction of the U. S. Naval Supply Depot, Oakland, Alameda County, California.

A certified copy of these minutes was recorded in the office of the County Recorder of Alameda County, California, on December 29, 1950, and a copy was also received and filed by the Secretary of State on December 29, 1950. Similar notification is being sent directly to the Secretary of Navy. This closes this case.

Yours very truly,

/s/ RUFUS W. PUTNAM
Rufus W. Putnam,
Executive Officer.

Enc.

[fol. 1157]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. 1481

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of item 9 of the minutes of the meeting of the State Lands Commission of December 18, 1950, on file in the office of the State Lands Commission; that said document has been compared by the undersigned with the original, and is a correct transcript therefrom.

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 15th day of January A. D. 1951.

/s/ RUFUS W. PUTNAM
(Title) Executive Officer
State Lands Commission

(SEAL)

[fol. 1158] 9. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY THE U. S. NAVAL SUPPLY CENTER, OAKLAND, ALAMEDA COUNTY, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126, GOVERNMENT CODE—W.O. 481) The Commission was informed as follows: On July 26, 1949, the Commission authorized the Executive Officer to order and conduct the requisite hearings pursuant to Section 126 of the Government Code and under the rules and regulations adopted by the Commission on June 14, 1949, on applications for consent to acquisition by the United States of lands comprising a number of installations, among which was the United States Naval Supply Center, Oakland, Alameda County, California. On April 17, 1950, an application for acceptance of jurisdiction by the United States of the lands pertaining to this installation was executed by Francis P. Matthews, Secretary of the Navy. The State Lands Commission at its meeting on October 23, 1950, authorized the Assistant Executive Officer to conduct the requisite hearings in this case.

Pursuant to said application, arrangements were made to conduct the public hearing at Alameda, California, in connection with other similar hearings scheduled for the same day and place. The notice of such public hearing was published in the Oakland Tribune, Oakland, California, on October 6, 1950, and service on the Clerk of the Board of Supervisors of Alameda County was made on October 3, 1950. Notices were thus published and served in compliance with Section 2702, California Administrative Code, Title 2.

Hearings were held by the Assistant Executive Officer at Headquarters, U. S. Naval Air Station, Alameda, California, beginning at 9 A.M., October 24, 1950. A record of the hearing was made and the transcript was made a part of the Commission record in this case. The Attorney General was represented by Herbert E. Wenig, Esq., Deputy Attorney General.

Appearances were made on behalf of the Navy by the Executive Officer, U. S. Naval Supply Center, Captain Thomas L. Becknell, Jr., U. S. Navy, also by Mr. Charles A. Baker and Mr. James L. McNally, representing the 12th Naval District. No other appearances were made in support of this application and none were made against it.

Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain specified conditions. Oral and documentary evidence were presented and received at the hearings in support of the contention of the applicant that these conditions have been met and complied with. Conclusions in regard to their presentations are as follows:

As applied to this case the acquisition "must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17, Section 8 of Article 1 of the Constitution of the United States".

The lands subject of this hearing are being used as a parking lot for the Naval Supply Center at Oakland. The Naval Supply Center's Executive Officer testified that the Center is responsible for supplying all naval forces ashore and

afloat in Pacific Ocean areas as well as support of West Coast Naval installations; it is an integral part of the National Defense System and as such is being maintained for the "erection of forts, magazines, arsenals, dockyards, and other needful buildings within the purview of Clause 17, Section 8, Article 1 of the Constitution of the United States".

The second condition requires that a finding must be made that "the acquisition must be pursuant to and in compliance with the laws of the United States". Mr. James L. McNally, Land Acquisition Attorney for the 12th Naval District, [fol. 1159] testified that the parcel of land involved was acquired by the United States in a condemnation proceeding No. 22212-R filed in the U. S. District Court, Northern District of California, Southern Division, on April 5, 1943. The condemnation proceeding was under authority of Public Laws 528 and 531 of the 77th Congress. Final Judgment was entered on August 5, 1943. Mr. McNally further testified that, in his opinion as a land acquisition attorney, all statutory requirements were fully complied with and the United States holds a good and sufficient title to the land in fee simple. A certificate of title covering this land was received in evidence.

The third condition upon which a finding is required is to the effect that "the United States must in writing have assented to acceptance of jurisdiction over the lands upon and subject to each and all of the conditions and reservations in this section prescribed". Under the provisions of an Act of Congress of October 9, 1940, Public Law 825 "the head or other authorized officer of any department of the Government" may accept jurisdiction from the State. A letter from the Department of the Navy dated April 17, 1950, accepting jurisdiction over the subject installation on behalf of the United States and signed by Mr. Francis P. Matthews, Secretary of the Navy, was received by the Division of State Lands on April 20, 1950. This acceptance is made subject to each and all of the conditions and reservations prescribed in Section 126, Government Code, State of California, and is, therefore, in accordance with law and with the rules of the Commission.

The fourth requirement is that the Commission must have found and declared that the acquisition is in the interest of the State.

Captain Thomas L. Beckhell, Jr., Executive Officer of the Naval Supply Center, testified that the area was acquired and is being utilized for parking automobiles of employees at the Naval Supply Center and as such was an important part of the Center itself. The existence of the parking lot keeps the streets free of parked cars, thus reducing traffic hazards.

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, THE STATE LANDS COMMISSION DETERMINES, WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED AND NOW USED BY THE DEPARTMENT OF THE NAVY OF THE UNITED STATES FOR THE UNITED STATES NAVAL SUPPLY CENTER, OAKLAND, ALAMEDA COUNTY, CALIFORNIA, SAID LAND BEING DESCRIBED AS FOLLOWS:

> All of that certain parcel described in final judgment, case Civil No. 22212-R, District Court of the United States in and for the Northern District of California, Southern Division, as recorded October 23, 1943, in Liber 4453, at page 70, Official Records, Alameda County, California, being 10.49 acres, more or less.

THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS (a), (b) AND (c) OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALIFORNIA HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST AND THAT SUCH ACQUISITION IS IN THE INTEREST OF THE STATE; ALSO THAT THE EXECUTIVE OFFICER BE DIRECTED TO FILE A CERTIFIED COPY OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE AND HAVE ONE RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE COUNTY OF ALAMEDA.

[fol. 1160] PLAINTIFF'S EXHIBIT NO. 12

(Letterhead of State Lands Commission,
Los Angeles, California)

REFER TO FILE NO.
W. O. 1002

July 9, 1951

Mr. J. L. McNally
Manager, Real Estate Branch
Property Administration Division
District Public Works Office
Twelfth Naval District
Federal Office Building
San Francisco 2, California

Dear Mr. McNally:

This is to advise you that the Secretary of the State of California acknowledged the filing on July 2, 1951, of a certified copy of Item No. 16 of the minutes of the meeting of the State Lands Commission of June 21, 1951, pertaining to acceptance of jurisdiction by the United States Government of lands comprising the Marine Corps Depot of Supplies in the Islais Creek Area in the City and County of San Francisco. You are further advised that a certified copy of this minute item was recorded in the Office of the County Recorder of the City and County of San Francisco on June 28, 1951.

A certified copy of Item No. 16 of the minutes of the meeting of the State Lands Commission of June 21, 1951, is attached for your files.

Yours very truly,

/s/ RUFUS W. PUTNAM
Rufus W. Putnam
Executive Officer

Enc. 1

[fol. 1161]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. 1493

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of Item 16 of the minutes of the meeting of the State Lands Commission held in Sacramento, California, on June 21, 1951, on file in the office of the State Lands Commission; that said document has been compared by the undersigned with the original, and is a correct transcript therefrom.

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 9th day of July, A. D. 1951.

/s/ RUFUS W. PUTNAM
(Title) Executive Officer
State Lands Commission

(SEAL)

[fol. 1162] 16. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY THE U. S. NAVY IN SAN FRANCISCO, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126, GOVERNMENT CODE —W.O. 1002.) The Commission was informed that on November 20, 1950, it authorized the Executive Officer to order and conduct the requisite hearings pursuant to Section 126 of the Government Code and under the rules and regulations adopted by the Commission on June 10, 1949, on an application for consent to acquisition by the United States of lands occupied by the Department of the Navy in the City and County of San Francisco, and used as a depot of supplies for the United States Marine Corps.

On October 31, 1950, an application for acceptance of jurisdiction by the United States of the lands pertaining to this installation was executed by John T. Koehler, Acting Secretary of the Navy, and forwarded to the office of the State Lands Commission.

Pursuant to said application, arrangements were made to conduct the requisite public hearing at San Francisco, California, at 10.00 a. m., in Room 611 State Building, on May 9, 1951. The notice of such public hearing was published in the San Francisco Chronicle, San Francisco, California, on April 23, 1951, and service of notice on the Clerk of the Board of Supervisors of San Francisco County was made on April 23, 1951. Notices were thus published and served in compliance with Section 2702, California Administrative Code, Title 2.

Hearings were held by the Executive Officer at the published time and place, beginning at 10.00 a. m. A record of the hearing was made, and the transcript was made a part of the Commission record in this case. The Attorney General was represented by Mr. Walter S. Rountree, Deputy Attorney General.

Appearances were made on behalf of the applicant by Lt. Col. Albert Dale Graves, U.S.M.C., Operations Officer of the Marine Corps Depot of Supplies, and by Mr. Charles A. Baker and Mr. James L. McNally, representing the Twelfth Naval District. No other appearances were made in support of this application, and none were made against it.

Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain specified conditions. Oral and documentary evidence was presented and received at the hearings in support of the contention of the applicant that these conditions have been met and complied with. A summary thereof follows:

Evidence was presented to the effect that the acquisition was made for the "erection of forts, magazines, arsenals, dockyards, and other needful buildings within the purview of Clause 17, Section 8, Article I of the Constitution of the United States". According to evidence presented, and as observed by inspection, the installation was erected and has been continuously in use as a Marine Corps supply depot and is now being used for that purpose.

The second condition requires that a finding must be made that "the acquisition must be pursuant to and, in

compliance with the laws of the United States". Evidence was presented by Mr. James L. McNally, a land acquisition attorney, to the effect that the property was acquired by the United States by condemnation in Action No. 25268, filed October 24, 1945, in the United States District Court, Northern District of California, Southern Division; an order of immediate possession was entered on the same date. This action was pursuant to the provisions of the Second War Powers Act (Public Law 507, 77th Congress, 56 Stat. 177, Title 50 App. U.S.C.A. Sec. 632). Declaration of Taking was filed on October 28, 1946, and judgments entered and duly recorded. Further evidence was presented by Mr. McNally, as an expert in land acquisition, to the effect that, in his opinion, all statutory requirements had been fully complied with and the United States is vested with a good and sufficient title in fee simple to the subject lands.

The third condition upon which a finding is required is to the effect that "the United States must in writing have assented to acceptance of jurisdiction over the lands upon [fol. 1163] and subject to each and all of the conditions and reservations in this section prescribed". Under the provisions of an Act of Congress of October 9, 1940, Public Law 825, "the head or other authorized officer of any department of the Government" may accept jurisdiction from the State. A letter from the Department of the Navy, accepting jurisdiction over the subject installation on behalf of the United States, and signed by Mr. John T. Koehler, Acting Secretary of the Navy, was received by the Division of State Lands on November 6, 1950. This acceptance is made subject to each and all of the conditions and reservations prescribed in Section 126, Government Code, State of California.

The fourth requirement is that the Commission must have found and declared that the acquisition is in the interest of the State. Lt. Col. Albert D. Graves testified that the Marine Corps Depot of Supplies is an integral part of the National Defense System, and in that respect its mission is in the interest of the State. He further testified that the installation employed about 2,700 people, with a monthly payroll of about $560,000.

SUMMARY

The hearings on this case were held at San Francisco, California, on May 9, 1951, pursuant to Commission authority. The findings of the hearing officer are as follows:

1. The property involves some ninety (90) acres of land in the Islais Creek section of San Francisco, and was acquired and is being used as a depot of supplies by the United States Marine Corps.

   The acquisition comes within the purview of Clause 17, Section 8, Article I, of the Constitution of the United States, which requires that it be "for the erection of forts, magazines, arsenals, dockyards and other needful building or other public purposes";

2. The acquisition was by condemnation, and was made pursuant to the laws of the United States. The United States is vested with a good and sufficient title in fee simple to the subject lands;

3. The United States, through the Acting Secretary of the Navy, has assented to acquisition of jurisdiction, subject to all conditions of Section 126 of the Government Code, State of California;

4. Acquisition is in the interest of the State in view of its value as an integral part of the National Defense System, and by reason of its substantial contribution to the economy of the State;

5. All requirements of Section 126 of the Government Code of the State of California have been complied with by the applicant, and by the State Lands Commission and its staff.

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, THE STATE LANDS COMMISSION DETERMINES, WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED AND NOW USED BY THE DEPARTMENT OF THE NAVY FOR THE MAINTENANCE OF A MARINE CORPS DEPOT OF SUPPLIES, IN SAN FRANCISCO CITY AND COUNTY, CALIFORNIA, SAID LANDS BEING DESCRIBED AS FOLLOWS:

[fol. 1164] APPROXIMATELY 90.41 ACRES OF LAND IN THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, ACQUIRED IN THAT CONDEMNATION PROCEEDING IDENTIFIED AS CIVIL NO. 25268-R, IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, AND MORE FULLY AND PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED TO THE APPLICATION,

THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS (a), (b) AND (c) OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALIFORNIA, HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST AND THAT SUCH ACQUISITION IS IN THE INTERESTS OF THE STATE. THE STATE LANDS COMMISSION DIRECTS THE EXECUTIVE OFFICER TO FILE A CERTIFIED COPY OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE, AND HAVE ONE RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE CITY AND COUNTY OF SAN FRANCISCO.

[fol. 1165] PLAINTIFF'S EXHIBIT NO. 13

(Letterhead of State Lands Commission,
Los Angeles, California)

REFER TO FILE NO.
W.O. 1470

May 10, 1954

District Public Works Officer
Twelfth Naval District
U. S. Navy
San Bruno, California

Attention: Mr. James L. McNally, Attorney Advisor

Dear Mr. McNally:

DE210-jm/td (2975-1) Ser 3712

Enclosed for your records is a certified copy of the action taken by the State Lands Commission at its meeting on April 27, 1954, in connection with acceptance of exclusive jurisdiction made by the Secretary of the Navy on behalf of the United States over the 76.15-acre storage facilities site of the Naval Air Station, Alameda, California.

Pursuant to the provisions of Section 126 of the Government Code of the State of California, certified copies of this minute action were filed on May 4, 1954, with the County Recorder of the County of Alameda, California, and with the Secretary of State of the State of California.

By Receipt No. AJ37511, dated May 5, 1954, F. Verngren, Deputy, on behalf of Thomas W. Fitzsimmons, County Recorder, acknowledged that the document had been "Received for Record" in the County Recorder's Office, County of Alameda, State of California.

By certificate of filing dated May 5, 1954, Chas. J. Hagerty, Assistant Secretary of State, on behalf of Frank M. Jordan, Secretary of State of the State of California, certified to

receipt and filing of the document in the official records of the State.

Yours very truly,

/s/ RUFUS W. PUTNAM
Rufus W. Putnam
Executive Officer

RWP:JS
Enc. 1

Certificate No. 1651 (with minute item 12 of 4/27/54)

[fol. 1166]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. L.A. 1651

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of the action taken by the State Lands Commission at its meeting in Sacramento, California, on April 27, 1954, in connection with acceptance of exclusive jurisdiction by the Secretary of the Navy, on behalf of the United States, over the 76.15-acre storage facilities site of the Naval Air Station, Alameda, California (Item 12, Minute Pages 2061 to 2066 inclusive), on file in the office of the State Lands Commission; that said minute item been compared by the undersigned with the original, and is a correct transcript therefrom.

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this Tenth day of May, A. D. 1954

/s/ JULIA T. STAHL
(TITLE) STATE LANDS COMMISSION

(SEAL)

[fol. 1167] 12. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY AN ANNEX TO THE U. S. NAVAL AIR STATION, ALAMEDA, ALAMEDA COUNTY, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126, GOVERNMENT CODE—W.O. 1470.) On June 13, 1953, an application for acceptance of jurisdiction by the United States of the lands pertaining to this installation was executed by R. B. Anderson, Secretary of the Navy, and received in the office of the Division of State Lands on June 19, 1953.

On July 2, 1953 (Minute Item 17, pages 1831-32), the Commission authorized the Executive Officer to order and conduct the requisite hearing pursuant to Section 126 of the Government Code and under Article 7 of the Rules and Regulations adopted by the Commission on August 29, 1951 (Minute Item 47, page 1441), on an application for consent to acquisition by the United States of lands used for additional storage facilities at the U. S. Naval Air Station, Alameda, California; the proceedings and determination of such hearing to be reported to the Commission for final consideration and action.

Pursuant to said application, arrangements were made to conduct the requisite public hearing at San Francisco, California, in the State Building, on November 18, 1953.

The notice of such public hearing was published in the Oakland Tribune, Oakland, California, on November 2, 1953, and service on the Clerk of the Board of Supervisors of Alameda County was made on October 28, 1953. Notices were thus published and served in compliance with Section 2602, California Administrative Code, Title 2.

A hearing was held by the Executive Officer at Room 606 State Building, San Francisco, California, beginning at 9:30 a.m., November 18, 1953. A record of the hearing was [fol. 1168] made, and the transcript was made a part of the Commission's record in this case. The Attorney General was represented by Mr. Herbert E. Wenig, Deputy Attorney General.

Appearances were made on behalf of the applicant by Mr. James L. McNally, Attorney Adviser, Twelfth Naval District; by Commander Robert F. Farrington, U. S. Navy, Executive Officer, U. S. Naval Air Station, Alameda.

Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain specified conditions. Oral and documentary evidence was presented and received at the hearing in support of the contention of the applicant that these conditions have been met and complied with. Conclusions in regard to the presentation are as follows:

Evidence was presented at the hearing to the effect that the acquisition was made for the "erection of forts, magazines, arsenals, dockyards, and other needful buildings within the purview of Clause 17, Section 8, Article I of the Constitution of the United States." According to that evidence the primary mission of the Naval Air Station is to maintain and operate a base for units of the naval aeronautical establishment to serve as a primary aviation supply point, including an aeronautical outfitting and assembly point, and to provide facilities for the operation, servicing, overhauling, assembly, and repair of aircraft, and for the quartering and messing of military personnel.

The second condition requires that a finding must be made that "the acquisition must be pursuant to and in compliance with the laws of the United States." The property was acquired by the United States in a condemnation action entitled "United States of America vs. 76.15 acres of land in the City of Alameda, Regents of the University of California, Defendants", Action No. 30735 in the District Court of the United States for the Northern District of California, Southern Division. The property was acquired pursuant to authorization contained in Public Law 910 of the 81st Congress, approved January 6, 1951, and funds were appropriated by Public Law 911 of that Congress. On Decem-

ber 13, 1951, a Declaration of Taking was filed in the condemnation action describing the subject property by metes and bounds and by a map attached thereto, and judgment was duly entered thereon. With the Declaration of Taking there was deposited to the Registry of the Court the amount of just compensation estimated to be due for the property taken. Thus, the requirements of the Declaration of Taking statute, as contained in Title 40, Section 258A of the U. S. Code, were complied with and all requirements to vest fee title in the United States were fulfilled.

A copy of the Certificate of Title, of the Declaration of Taking and Judgment thereon, and of the Judgment on Award were filed with the Commission. It was further established that the United States is vested in a good and sufficient title in fee simple to the subject lands.

[fol. 1169] The third condition upon which a finding is required is to the effect that "the United States must in writing have assented to acceptance of jurisdiction over the lands upon and subject to each and all of the conditions and reservations in this section prescribed." Under the provisions of an Act of Congress on October 9, 1940, Public Law 825, "the head or other authorized officer of any department of the Government" may accept jurisdiction from the State. A letter from the Secretary of the Navy accepting jurisdiction over the subject installation on behalf of the United States and signed by him (R. B. Anderson) was received by the Division of State Lands on June 19, 1953. The Deputy Attorney General pointed out some defects in the form of acceptance which were remedied by letter, dated March 22, 1954, signed by the Secretary of the Navy. (Exhibit "F" of the Transcript.) This acceptance is made subject to each and all of the conditions and reservations prescribed in Section 126, Government Code, State of California, as amended, as of June 13, 1953, and is, therefore, in accordance with law and with the Rules and Regulations of the Commission.

The fourth requirement is that the Commission must have found and declared that the acquisition is in the interest of the State. Testimony was presented to the effect that the Naval Air Station employs approximately 8,500 people. A large part of personnel rent or own homes in that area, resulting in economic benefits to the community and to the State in general.

The monthly payroll amounts to approximately four million dollars. The Station has its own police and fire protection forces, thereby relieving the state, city and county of the cost of maintaining these services in this area.

No appearances were made in opposition to the request of the Navy.

SUMMARY

The hearing on this case was held at the State Building, San Francisco, California, on November 18, 1953, pursuant to Commission authority. The findings of the hearing officer are as follows:

1. The property involves 76.15 acres of land acquired by the United States for an extension of the Naval Air Station, Alameda, California. The acquisition comes within the purview of Clause 17, Section 8, Article I, of the Constitution of the United States, which requires that it be "for the erection of forts, magazines, arsenals, dockyards and other needful buildings or other public purposes"; therefore, in this respect, the acquisition complies with the provisions of Section 126 of the Government Code.
2. The acquisition was by condemnation, and was made pursuant to the laws of the United States. The United States is vested with a good and sufficient title in fee simple to the subject lands.
3. The United States, through the Secretary of the Navy, has assented to acquisition of jurisdiction subject to all conditions of Section 126 of the

Government Code, State of California, as amended, as of June 13, 1953.

[fol. 1170] 4. The acquisition is in the interest of the State in view of its value for national defense and of its continuing substantial contributions to State economy.

5. All requirements of Section 126 of the Government Code of the State of California have been complied with by the applicant and by the State Lands Commission and its staff.

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, IT WAS RESOLVED AS FOLLOWS:

THE STATE LANDS COMMISSION FINDS AND DECLARES WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED BY THE UNITED STATES AND NOW USED BY THE DEPARTMENT OF THE NAVY AS AN ADDITION TO THE NAVAL AIR STATION AT ALAMEDA, ALAMEDA COUNTY, CALIFORNIA, SAID LANDS BEING DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF, THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS (a), (b), AND (c) OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALIFORNIA, HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST AND THAT SUCH ACQUISITION IS IN THE INTEREST OF THE STATE; FURTHER, THAT THE EXECUTIVE OFFICER IS DIRECTED TO FILE A CERTIFIED COPY OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE AND TO HAVE ONE RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE COUNTY OF ALAMEDA.

Attachment: Exhibit "A"

[fol. 1171] EXHIBIT "A"

1951 FEE ACQUISITION OF ADDITIONAL STORAGE AREA FOR NAS ALAMEDA EMBRACING 76.15 ACRES MORE OR LESS (U.S.) vs REGENTS OF THE UNIVERSITY OF CALIFORNIA, CIVIL #30735

All that certain piece or parcel of land located and situate in the City of Alameda, County of Alameda, State of California, and more particularly described as follows:

A portion of Tract 39, according to the map entitled, "Map of Alameda Marsh Land, as partitioned among the owners thereof in the suit numbered 8923 and entitled "Pacific Improvement Company, plaintiff, vs. James A. Waymire, et al, defendants, Superior Court of Alameda County, State of California", filed July 30, 1900 in the office of the Recorder of Alameda County and of record in Map Book 25 at pages 74, 76 and 78, bounded as follows:

Beginning at a point on the western line of said Tract 39, distant thereon north 0° 34′ west 1240.19 feet from the northern line of Atlantic Avenue, formerly called Industrial Highway as said highway is described in the deed from Alameda Belt Line to the City of Alameda, dated October 3, 1930, recorded October 21, 1930 in Book 2485 of Official Records of Alameda County, page 103; running thence along said line of Tract 39 north 0° 34′ west 986.83 feet to the southern line of the 73.289 acre parcel of land described in the Final Judgment in Condemnation made May 16, 1946 by the United States District Court, Northern District of California, Southern Division, Case No. 22712-G, a certified copy of which judgment was recorded June 18, 1946 in Book 4899 of Official Records of Alameda County, page 455; thence along the last mentioned line south 88° 20′ east 2400 feet to the eastern line of said 73.289 acre parcel; thence along the last mentioned line north 1° 40′ east 140.00 feet to the southern line of the 6.1442 acre parcel of land described in the deed by the Regents

of the University of California to United States of America, dated August 27, 1948, recorded September 2, 1948 in Book 5597 of Official Records of Alameda County, page 433; thence along the last mentioned line south 88° 20′ east 1670.24 feet to the general western line of Webster Street as said line was established by the deed from the Regents of the University of California to the City of Alemeda, dated April 13, 1944, recorded May 4, 1944 in Book 4555 of Official Records of Alameda County, page 50; thence along the last mentioned line the three following courses and distances:

South 5° 54′ 38.5″ west 28.52 feet to an angle point therein; south 3° 43′ 27″ west 352.37 feet; and north 89° 10′ east 42.00 feet to the western line of Webster Street, as said line was established by the deed to the City of Alameda dated May 31, 1928, recorded June 5, [fol. 1172] 1928 in Book 1867 of Official Records of Alameda County, page 266; thence along the last mentioned line south 0° 50′ east 74.95 feet; thence north 89° 00′ 30″ west 1339.29 feet to the direct production northerly of the course designated "North 0° 59′ 50″ east. . . . 102.00 feet" which course is in the general western line of the parcel of land described in the lease by The Regents of the University of California as Lessor and Alameda Amusement Co. Inc., as Lessee, dated July 1, 1949, recorded November 17, 1949 under Recorder's Series AD-79147, Official Records of Alameda County; thence along said produced line and along the course above mentioned and the direct production southerly of said course south 0° 59′ 50″ west 624.82 feet to the northern line of a 46.9591 acre parcel of land described in a decree made March 9, 1943 from the District Court of the United States of America, Northern District of California, Southern Division, in action United States of America vs. The Regents of the University of California et al, Case No. 22478-R, a certified copy of which decree was recorded March 15, 1943 in Book 4328 of Official Records of Alameda

County, page 497; thence along the last mentioned line north 89° 00′ 10″ west 2730.54 feet to the point of beginning, containing 76.15 acres more or less.

SUBJECT to an easement as recorded August 18, 1947 in Alameda County Official Record Book 5181 at page 384 for the construction use and maintenance of a water pipe line over a strip of land 10 feet in width, the same being more particularly described as follows:

Portion of Tract 39, according to "Map of Alameda Marsh Land as partitioned among the owners thereof, in the Suit numbered 8923 and entitled, Pacific Improvement Company, plaintiff, vs. James A. Waymire et al., defendants, Superior Court of Alameda County, State of California," filed July 30, 1900, in the office of the County Recorder of said Alameda County, and of record in Map Book 25, pages 74, 76 and 78, more particularly described as follows:

A strip of land of the uniform width of 10 feet lying westerly of and contiguous to the westerly line of Webster Street, as said westerly line is described in the deed from The Regents of the University of California to the City of Alameda, dated May 31, 1928, and recorded June 5, 1928, in Book 1867 of Official Records at page 266 and extending northerly from the northerly line of that certain 70.0287 acre tract of land described in the decree in Action No. 21816 W in the District Court of the United States for the Southern Division of the Northern District of California, which said decree was dated March 27, 1941, a certified copy of which was recorded March 28, 1941, in Book 4023 of Official Records at page 499, a distance of 1202.09 feet, more or less, to the southerly line of that portion of said Tract 39, described in the deed from The Regents of the University of California to the City of Alameda, dated April 13, 1944, and recorded May 4, 1944, in Book 4555 of Official Records, at page 50.

[fol. 1173] PLAINTIFF'S EXHIBIT NO. 14

(Letterhead of State Lands Commission,
Los Angeles, California)

REFER TO FILE NO.
W.O. 480; your
N1-13, 7802-jm/wg
(250) (5490)

January 15, 1951.

J. L. McNally, Esq.,
Real Estate Board,
District Public Works Office,
Twelfth Naval District,
Federal Office Building,
San Francisco 2, California.

In re: Alameda Naval Air Station

Dear Mr. McNally:

I am enclosing one certified copy of the minutes of the meeting of the State Lands Commission of December 18, 1950, pertaining to acquisition by the United States of jurisdiction of the Alameda Naval Air Station, Alameda, Alameda County, California.

A certified copy of these minutes was recorded in the office of the County Recorder of Alameda County, California, on December 29, 1950, and a copy was also received and filed by the Secretary of State on December 29, 1950. Similar notification is being sent directly to the Secretary of Navy. This closes this case.

Yours very truly,

/s/ RUFUS W PUTNAM
RUFUS W. PUTNAM.
Executive Officer.

Enc.

[fol. 1174]

DIVISION OF STATE LANDS
STATE LANDS COMMISSION
STATE OF CALIFORNIA
SACRAMENTO

No. 1483

The undersigned, acting in this behalf for the State Lands Commission, does hereby certify, that the annexed document is a true and correct copy of item 8 of the minutes of the meeting of the State Lands Commission of December 18, 1950, on file in the office of the State Lands Commission; that said document has been compared by the undersigned with the original, and is a correct transcript therefrom.

IN WITNESS WHEREOF, the undersigned has executed this certificate and affixed the seal of the State Lands Commission, this 15th day of January A. D. 1951.

/s/ RUFUS W. PUTNAM
(TITLE) Executive Officer
STATE LANDS COMMISSION

(SEAL)

[fol. 1175] 8. (ACQUISITION BY THE UNITED STATES OF LANDS OCCUPIED BY THE U. S. NAVAL AIR STATION, ALAMEDA, ALAMEDA COUNTY, CALIFORNIA, UNDER THE PROVISIONS OF SECTION 126 GOVERNMENT CODE—W.O. 480) The Commission was informed as follows: On July 26, 1949, the Commission authorized the Executive Officer to order and conduct the requisite hearings pursuant to Section 126 of the Government Code and under the rules and regulations adopted by the Commission on June 14, 1949, on applications for consent to acquisition by the United States of lands comprising a number of installations, among which was the United States Naval Air Station at Alameda, California. On April 17, 1950, an application for acceptance of jurisdiction by the United States of the lands pertaining to this installation was executed by Francis P. Matthews, Secretary of the Navy. On October 23, 1950, the Commis-

sion authorized the Assistant Executive Officer to conduct the hearing in this case.

Pursuant to said application, arrangements were made to conduct the requisite public hearing at Alameda, California, in connection with other similar hearings scheduled for the same day and place. The notice of such public hearing was published in the Oakland Tribune, Oakland, California, on October 6, 1950, and service on the Clerk of the Board of Supervisors of Alameda County was made on October 3, 1950. Notices were thus published and served in compliance with Section 2702, California Administrative Code, Title 2.

Hearings were held by the Assistant Executive Officer at Headquarters, U. S. Naval Air Station, Alameda, California, beginning at 11:00 A.M., October 24, 1950. A record of the hearing was made and the transript was made a part of the Commission record in this case. The Attorney General was represented by Herbert E. Wenig, Esq., Deputy Attorney General.

Appearances were made on behalf of the Navy by the Executive Officer of the U. S. Naval Air Station, Alameda, California, Commander John D. Lamade, U. S. Navy, also by Mr. Charles A. Baker and Mr. James L. McNally representing the 12th Naval District. No other appearances were made in support of this application and none were made against it.

Section 126 of the Government Code requires that the State Lands Commission must have found and declared to have occurred and to exist the fulfillment of certain specified conditions. Oral and documentary evidence were presented and received at the hearings in support of the contention of the applicant that these conditions have been met and complied with. Conclusions in regard to their presentation are as follows:

The only evidence at the hearing to the effect that the acquisition was made for the "erection of forts, magazines, arsenals, dockyards, and other needful buildings within the purview of Clause 17, Section 8, Article I of the Constitu-

tion of the United States", was a statement of opinion to that effect by Commander John D. Lamade, U. S. Navy, Executive Officer of the station. However, in view of the public knowledge of its use as a Naval Air Base for the training of naval aviators and the operation of naval air transports, in addition to the fact that Commander Lamade testified to its status as an integral part of the national defense system and as to its continuous use for such purpose since the lands were acquired it is believed that a finding can be made that the purpose of the acquisition comes within the limitations of the above quoted constitutional provision.

The second condition requires that a finding must be made that "the acquisition must be pursuant to and in compliance with the laws of the United States". The property was acquired by the United States by condemnation pursuant to the authority of the Second War Powers Act, Public Law 507, 77th Congress and Public Law 92, 78th Congress, as well as the General Declaration of Taking Statute, the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C.A., Section 258a. Certificates of title to all of the parcels acquired have been filed with the Commission. Evidence was presented by Mr. James L. McNally, a land [fol. 1176] acquisition attorney, to the effect that, in his opinion, all statutory requirements had been fully complied with and the United States is vested with a good and sufficient title in fee simple to the subject lands.

The third condition upon which a finding is required is to the effect that "the United States must in writing have assented to acceptance of jurisdiction over the lands upon and subject to each and all of the conditions and reservations in this section prescribed". Under the provisions of an Act of Congress of October 9, 1940, Public Law 825 "the head or other authorized officer of any department of the Government" may accept jurisdiction from the State. A letter from the Department of the Navy dated April 17, 1950, accepting jurisdiction over the subject installation on behalf of the United States and signed by Mr. Francis P. Matthews, Secretary of the Navy, was received by the Division of State Lands on April 20, 1950. This acceptance

is made subject to each and all of the conditions and reservations prescribed in Section 126, Government Code, State of California and is, therefore, in accordance with law and with the rules of the Commission.

The fourth requirement is that the Commission must have found and declared that the acquisition is in the interest of the State. The Executive Officer of the Naval Air Station, Commander John D. Lamade, testified that there was a decided benefit to the State of California from the Naval Air Station to the City of Alameda and the County, because of the employment of approximately 8,000 persons at the Air Station, receiving about $3,000,000 monthly payroll. He also testified that these employees reside within a five to ten mile radius of the Air Station, and in so doing return a greater part of their wages to the State of California and more specifically to the County of Alameda. He further testified that the Station was an integral part of the National Defense System.

UPON MOTION DULY MADE AND UNANIMOUSLY CARRIED, THE STATE LANDS COMMISSION DETERMINES, WITH RESPECT TO THOSE CERTAIN LANDS ACQUIRED AND NOW USED BY THE DEPARTMENT OF THE NAVY OF THE UNITED STATES FOR THE UNITED STATES NAVAL AIR BASE, ALAMEDA COUNTY, CALIFORNIA, SAID LANDS BEING DESCRIBED AS FOLLOWS:

> All of those certain parcels described in judgment on Declaration of Taking in Civil Action No. 23109-G, District Court of the United States, in and for the Northern District of California, Southern Division, as recorded January 6, 1945, in Liber 4623, at page 483, Official Records, Alameda County, California, being in all 154.6 acres, more or less,

THAT THE CONDITIONS PRESCRIBED IN SUBDIVISIONS a, b AND c, OF SECTION 126 OF THE GOVERNMENT CODE OF THE STATE OF CALI-

FORNIA, HAVE BEEN FOUND TO HAVE OCCURRED AND TO EXIST AND THAT SUCH ACQUISITION IS IN THE INTERESTS OF THE STATE; ALSO THAT THE EXECUTIVE OFFICER BE DIRECTED TO FILE A CERTIFIED COPY OF THIS FINDING IN THE OFFICE OF THE SECRETARY OF STATE AND HAVE ONE RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF THE COUNTY OF ALAMEDA.

[fol. 1177] (Letterhead of State Lands Commission, Los Angeles, California)

REFER TO FILE NO.
W.O. 482

February 13, 1951

Mr. J. L. McNally
Realty-Legal Branch
District Public Works Office
Twelfth Naval District
Federal Office Building
San Francisco 2, California

Dear Mr. McNally:

Formal advice has just been received that the County Recorder of Contra Costa County has recorded the certified copy of Item 11 of the Minutes of the meeting of the State Lands Commission of December 18, 1950 pertaining to acquisition and jurisdiction by the United States of lands used as the Naval Fuel Depot at Point Molate, Richmond, California. The document was recorded on December, 29, 1950 and it appears in the official records in Volume 1693, Page 302.

The Secretary of State of California has advised this office that a similar recording in his archives was made on December 29, 1950.

As a result of these advices this office is closing the case on this installation.

Very truly yours,

/s/ RUFUS W. PUTNAM
RUFUS W. PUTNAM
Executive Officer

[fol. 1178] (Letterhead of State Lands Commission, Los Angeles, California)

REFER TO FILE NO.
W. O. 482

February 19, 1951

Mr. J. L. McNally, Manager
Real Estate Branch
Property Administration Division
District Public Works Office
Twelfth Naval District
Federal Office Building
San Francisco 2, California

Dear Mr. McNally:

The State Lands Commission, on December 18, 1950 took the following action.

"Upon motion duly made and unanimously carried, the State Lands Commission determines, with respect to those certain lands acquired and now used by the Department of the Navy of the United States for the United States Naval Fuel Depot, Contra Costa County, California, said lands being described as follows:

> All of those certain parcels described in judgment on Declaration of Taking No. 1 in Civil Action No. 22215-S. District Court of the United States, in and for the Northern District of California, Southern Division, as recorded March 28, 1945, in Liber 816, at page

14, Official Records, Contra Costa County, California, being in all 402.583 acres, more or less,

That the conditions prescribed in sub-division a, b and c, of Section 126 of the Government Code of the State of California, have been found to have occurred and to exist and that such acquisition is in the interest of the State; also that the Executive Officer be directed to file a certified copy of this finding in the office of the Secretary of State and have one recorded in the office of the County Recorder of the County of Contra Costa."

Very truly yours,

/s/ J. STUART WATSON
J. STUART WATSON
Assistant Executive Officer

[fol. 1179] DEFENDANT'S EXHIBIT A

	ALL CARRIERS ARE REQUESTED TO ATTACH THE FOLLOWING:
	ALL INFORMATION REQUESTED HEREIN IS CONSIDERED IN THE MOVEMENT OF DOD FREIGHT. FAILURE TO PROVIDE ANY PORTION THEREOF OR AMENDMENTS THERETO REFLECTING MAJOR CHANGES MAY AFFECT YOUR PARTICIPATION IN SUCH MOVEMENTS. INDIVIDUAL CARRIER EMBARGO NOTICES OR ANY OTHER DATA, NOT NORMALLY FURNISHED BY ATA OR TARIFF BUREAUS, AFFECTING YOUR ABILITY TO PERFORM SERVICE SHOULD BE FILED PROMPTLY BY YOU.
	As a matter of information motor carrier facilities files are maintained by various offices of the Army, Navy, Air Force and Marine Corps.
	1. An exact copy of each effective Certificate issued by the Interstate Commerce Commission or any State Regulatory Body including all subs thereto and all effective temporary authorities. Attach as Appendix 2.
	2. A list of all points, places or territories served direct. Attach as Appendix 3.
	3. A list of all points at which terminals or agency stations are maintained and the address and telephone number at each such point. Attach as Appendix 4.
	4. A highway map showing routes served by regular route operations or the exact territory served by irregular route operations. Attach as Appendix 5.
	5. A schedule showing your normal operating time between terminal points i.e. same day, overnight, etc. *(Regular Route Common Carriers only)*. Attach as Appendix 6.
	6. A certificate of cargo insurance issued by the insurance company showing names of insurers, amounts carried, policy numbers and expiration dates. A provision shall be included in the certificates of insurance providing that the military agency to whom this form is furnished be advised 30 days prior to any change in the amount of insurance coverage. Attach as Appendix 7.

4. A highway map showing routes served by regular route operations or the exact territory served by irregular route operations. Attach as Appendix 5.

5. A schedule showing your normal operating time between terminal points i.e. same day, overnight, etc. *(Regular Route Common Carriers only)*. Attach as Appendix 6.

6. A certificate of cargo insurance issued by the insurance company showing names of insurers, amounts carried, policy numbers and expiration dates. A provision shall be included in the certificates of insurance providing that the military agency to whom this form is furnished be advised 30 days prior to any change in the amount of insurance coverage. Attach as Appendix 7.

7. A list, in the following format, of all carriers with whom trailer interchange is maintained on a regularly established basis, showing name of carrier(s), point(s) of interchange, and whether you will permit your own equipment to be further interchanged beyond the connecting line. Attach as Appendix 8.

TRAILER INTERCHANGE FORMAT

Point or Points of Interchange	Name of Connecting Carrier	Permit further interchange of own equipment beyond connecting line	
		Yes	No

NJ 35101
Duff Exhibit No. A
Filed MAR 19 1956
C. W. Claypoole, Clerk
By C. A. Littlefield Deputy Clerk

8. A statement whether heater protective service can be provided on TL and/or LTL when required and, if provided on interline movements, the name of the connecting lines. Attach as Appendix 9

[fol. 1180]

MOTOR COMMON CARRIER FACILITIES QUESTIONNAIRE	DATE 19	Budget Bureau No. 22-R117 Approval Expires 31 Dec 1953

NOTE: This form is used to secure information from motor common carriers EXCLUDING household goods carriers.

I	NAME OF CARRIER			TELEPHONE NUMBER
	ADDRESS *(Street, City and State)*			
II	TYPE OF CARRIER	REGULAR ROUTE COMMON	☐ INTERSTATE	☐ INTRASTATE
		IRREGULAR ROUTE COMMON	☐ INTERSTATE	☐ INTRASTATE
III	EFFECTIVE OPERATING AUTHORITIES *(See Item 1 on reverse side hereof)*			
	a. COMMODITIES	☐ GENERAL	☐ EXPLOSIVES	☐ SPECIFIC
	b. RESTRICTIONS	☐ USUAL	☐ OTHER	
	c. SPECIALIZED SERVICES			
	d. CERTIFICATE NUMBERS	ICC	STATE	

IV OVER-THE-ROAD *(Line Haul)* EQUIPMENT OPERATED

EXPLANATION OF "NUMBER OF UNITS" COLUMN BELOW:
(a) EQUIPMENT OWNED AND UNDER LONG TERM LEASE *(30 days or more)*
(b) LEASED, LESS THAN 30 DAYS *(State daily average number of units based on previous 6 month period.)*

NUMBER OF UNITS		TRUCKS, SEMI OR FULL TRAILERS *(Indicate)*	TYPE OF BODY	LENGTH	AVERAGE CAPACITY		
(a)	(b)				POUNDS	CUBIC FEET	GALLONS
		Tractors					

IV OVER-THE-ROAD *(Line Haul)* EQUIPMENT OPERATED

EXPLANATION OF "NUMBER OF UNITS" COLUMN BELOW: --
(a) EQUIPMENT OWNED AND UNDER LONG TERM LEASE *(30 days or more)*
(b) LEASED, LESS THAN 30 DAYS *(State daily average number of units based on previous 6 month period.)*

NUMBER OF UNITS (a)	NUMBER OF UNITS (b)	TRUCKS, SEMI OR FULL TRAILERS *(Indicate)*	TYPE OF BODY	LENGTH	AVERAGE CAPACITY POUNDS	AVERAGE CAPACITY CUBIC FEET	AVERAGE CAPACITY GALLONS
		Tractors					

List and describe all special equipment, such as refrigerators, low boys, truckaways etc. Show number of units of each length in each body type. Attach separate list, if necessary, furnishing above information as Appendix I.

V INSURANCE *(See Item 6 on reverse side hereof)*

(a) CARGO $

VI NAME OF TARIFF PUBLISHING AGENTS

ADDRESS

VII IF YOU PUBLISH INDIVIDUAL TARIFFS, ATTACH ONE COPY OF EACH EFFECTIVE ISSUE AND EFFECTIVE SUPPLEMENTS THERETO, AND PLACE THIS OFFICE ON YOUR MAILING LIST FOR FUTURE SUPPLEMENTS THERETO OR REISSUES THEREOF.

IMPORTANT - SEE REVERSE SIDE FOR ADDITIONAL INFORMATION TO BE FURNISHED.

DD FORM 1 NOV 52 **677**

[fol. 1181] DEFENDANT'S EXHIBIT "B"

RULES GOVERNING

FILING AND POSTING OF TARIFF SCHEDULES

FOR

GAS, ELECTRIC, TELEPHONE, TELEGRAPH, WATER, AND HEAT UTILITIES

General Order No. 96

(STATE EMBLEM)

PUBLIC UTILITIES COMMISSION

STATE OF CALIFORNIA

[fol. 1182] X. CONTRACTS AND SERVICES AT OTHER THAN FILED TARIFF SCHEDULES

A. *General Requirements and Procedure.* Except as expressly permitted by the succeeding subsection B of this Section X, no utility of a class specified herein shall hereafter make effective any contract or arrangement for the furnishing of any public utility service at rates or under conditions other than the rates and conditions contained in its tariff schedules on file and in effect at the time, unless it first obtain the authorization of the Commission to carry out the terms of such contract or arrangement. Request for such authorization should be made by formal application in accordance with the Commission's Rules of Procedure, except that where the service is of minor importance or temporary in nature, the Commission may accept an application and showing of necessity by letter. Each such contract shall contain a provision indicating the understanding of the parties that it shall not become effective until such authorization of the Commission is obtained. Such contract shall also contain substantially the following provision:

"This contract shall at all times be subject to such changes or modifications by the Railroad Commission of California as said Commission may, from time to time, direct in the exercise of its jurisdiction."

B. *Governmental Agencies.* Notwithstanding the provisions contained in subsection A hereof, a public utility of a class specified herein may, if it so desires, in addition to the classes of service specified as applicable to them in Section 17 of the Public Utilities Act (applicable to telephone and telegraph companies) furnish service at free or reduced rates or under conditions otherwise departing from its filed tariff schedules to the United States and to its departments and to the State of California and its political subdivisions and municipal corporations, including the departments thereof, and to public fairs and celebrations. The utility shall promptly advise the Commission thereof by letter and, where a contract has been entered [fol. 1183] into, submit three copies of such contract for filing. The Commission may, in an appropriate proceeding in the exercise of its jurisdiction, determine the reasonableness of such service at free or reduced rates or under conditions departing from its filed tariff schedules. This subsection shall not be construed as applicable to contracts for resale service.

[fol. 1184] DEFENDANT'S EXHIBIT "C"

TRANSPORTATION

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A REPORT TO THE CONGRESS

by the

COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

March 1955

[fol. 1185] COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

HERBERT HOOVER, *Chairman*

HERBERT BROWNELL, JR.	ROBERT G. STOREY
JAMES A. FARLEY	CLARENCE J. BROWN
ARTHUR S. FLEMMING	CHET HOLIFIELD
HOMER FERGUSON	JOSEPH P. KENNEDY
JOHN L. MCCLELLAN	SIDNEY A. MITCHELL

SOLOMON C. HOLLISTER

[fol. 1186] LETTER OF TRANSMITTAL

March 28, 1955.

DEAR SIRS:

In accordance with Public Law 108, Eighty-third Congress, approved July 10, 1953, the Commission on Organization of the Executive Branch of the Government submits herewith its report on Transportation.

The Commission has had the services of an able subcommittee of the Committee on Business Organization of the Department of Defense presided over by Mr. Perry M. Shoemaker, President of the Lackawanna Railroad. Their exhaustive investigation is embodied in the Subcommittee

Report on this subject which will be filed with the Congress in the near future.

The recommendations of the Commission do not necessarily coincide with all of those of the Subcommittee, but include the results of independent investigation by the Commission's staff and the experience of the members of the Commission.

/s/ HERBERT HOOVER
Chairman.

The Honorable
The President of the Senate

The Honorable
The Speaker of the House of Representatives

[fol. 1187] THE NEED FOR MORE EFFECTIVE TRAFFIC MANAGEMENT

There is a general lack of modern traffic management in the Federal Government. Due to the lack of an overall plan, there results duplication, inefficiency, and waste.

The task force states that Government agencies do not make the fundamental distinction between traffic *management* and traffic *operational functions*. It states that the Government's traffic problems are much the same as those of a commercial firm with multiple-plant operations where the general traffic manager and the traffic control office perform traffic *management* and, at the same time, traffic directors at various plants perform the *operational functions* incidental to the day-to-day handling of traffic. These operating personnel are responsible to the general traffic manager, even though these individuals are carried on the payrolls and are under the disciplinary supervision of local plant management.

[fol. 1188] The fact that the Federal Government has a variety of traffic movements does not differentiate the Government's traffic problems from those of private industry. A commercial concern may have many types of plant operations at widely separated localities producing basic materials as well as numerous and diverse finished products.

The central traffic management is responsible for policies of routing and relations with the carriers and for furnishing operational traffic personnel trained to deal with the particular and peculiar requirements of the individual operation.

The task force states that centralized *traffic management* in Government, as differentiated from *traffic operations*, may be defined as the *central determination and direction* respecting policy control of the movement of persons and goods in accordance with movement planning of routing, of overall costs, of research and study of Government traffic movements, of representation of the Government in proceedings before regulatory agencies and carrier rate bureaus, of economics of facility locations, of development of improvements in service, of review of handling procedures, and of nearby procurement that minimizes haulage.

Our task force points out that traffic managers in commercial business cannot be effective if procurement decisions are made without considering the cost of transportation, and if the warehousing and distribution blueprint is not geared to the least transportation expense. The same principles should apply to the Government.

[fol. 1189] EXAMPLES OF THE NEED FOR BETTER TRAFFIC MANAGEMENT

The task force states there is no better illustration of poor traffic management than in the Federal subsistence services. They quote a Munitions Board staff report on the subsistence supply system made in the spring of 1953 which called attention to the handling of the pack of canned salmon from the west coast to Bremerhaven, Germany, via the east coast at almost twice the transportation cost had the same movement gone from the west coast to Bremerhaven by all-water shipment. An analysis of the transportation of a seasonal pack of canned peaches showed the same result.

Members of the present Commission's Subsistence Task Force noted a quantity of sugar being purchased at refineries in New York, shipped to the Army depot at Schenectady, only to have much of it backhauled. One particular

carload was wanted for redistribution at Fort Totten, New York City, so quickly that it was not even opened and unloaded at Schenectady.

In an effort to minimize such instances in the Government agencies, an agreement called the Horkan-Royar agreement was set up in 1953 by the Army and Navy. This Agreement provides for the periodic survey of shipments from vendors storage depots, of canned fruit and vegetables, and it also encourages intraservice depot transfer of subsistence items in order to better distribute supplies among and between the Services. The Agreement could be made an effective tool in the hands of Department of Defense traffic management. Some parts of the Agreement [fol. 1190] worked out admirably, but the arrangement has been ignored with the establishment by the Navy of a distribution point at New Orleans serving the relatively distant points of Memphis, Dallas, Norman (Okla.), Pensacola, and Jacksonville. The effect is that the Naval Air Station at Memphis (some 394 miles away from New Orleans) duplicates an Army subsistence depot a few miles distant. Also, a naval air station at Dallas is served from New Orleans some 520 miles away while there is an Army depot located but 32 miles away at Fort Worth.

The task force also questions such operations as the flying of ping-pong balls from Westover Field to Berlin; the flying of 25,000 pounds of cement from the United States to an Air Force base at Bermuda. They also cite the orders of a theater commander requiring the Military Air Transport Service to fly a substantial quantity of dog-food from the west coast to Okinawa. And they comment "that certain dogs in Okinawa had available to them dog-food at an overall cost per pound probably setting a world's record."

An example of disregard of the cost of transportation is the occasion when one of the military Services purchased antifreeze in Philadelphia because the price quoted there was one-half cent per unit less than quoted in Oakland, Calif. The antifreeze then was transported from Philadelphia to Oakland for overseas shipment, with resultant waste of Government funds.

An example of unnecessary crosshauling was found in the Veterans' Administration which maintains three depots—[fol. 1191] Somerville, N. J., Hines, Ill., and Wilmington, Calif. These depots provide storage and issue functions for 235 hospitals, domiciliaries, homes, and offices. About 70 percent of the volume of shipments consists of nonperishable food, and 30 percent medical and general supplies. Nonperishable supplies are purchased from vendors throughout the country, f. o. b. Veterans' Administration depots. These supplies are then reshipped as required to its installations located in each of the 48 States; yet the General Services Administration has 12 stores depots located throughout the country, many of which are considerably closer to the Veterans' Administration consuming centers. Furthermore, the military has 30 subsistence warehouses located throughout the country, many of which are also closer to consuming activities than those of the Veterans' Administration.

It is not to be assumed that such examples are the result of negligence, but as clear evidence that our existing system has not provided for an integration of inventory control, procurement, warehousing, and management direction of transportation so as to avoid substantial wastage of transportation and storage dollars. Someone is paying the cost. It is hard to visualize this someone not being the taxpayer.

[fol. 1192] VIII. NATIONAL TRANSPORTATION POLICY, RATES, AND AGENCY REPRESENTATION

The Policy

In the Transportation Act of 1940, the Congress enunciated as a preamble to the Interstate Commerce Act the following national transportation policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation * * *; foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges

> for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *.

Congress has made other statements of similar policy in the Civil Aeronautics Act of 1938 and the Merchant Marine Act of 1936.

There is no question of the importance to the Nation of an adequate and prosperous transportation system. Such a system is essential for national emergency and civil defense. The activities of the Federal Government as a shipper of persons and property should be carried on with the establishment of such a transportation system in mind. [fol. 1193] The policies and activities of the agencies of the Government together have an enormous effect on the Nation's private transportation system. Yet, as the task force points out, many of these agencies consider they have little or no responsibility for implementing the National Transportation Policy. The task force quotes the Comptroller General, who is the agent of Congress, as stating:

> That the requirements of the National Transportation Policy are believed to be too comprehensive and indefinite to permit any satisfactory application by traffic managers for the Government in the discharge of their function in procuring transportation services * * * and that any attempt on their part to give it effect in procuring services or proper rates for the Government would result in uncertainty and confusion in the award of Government business, with understandable protest and objection from the carrier or carriers tendering rejected lower rates.

There is an evident need for redefining the National Transportation Policy to take account of the Government's own policies and activities as an important user of commercial transportation.

In this connection we note with approval the appointment by the President of a distinguished Cabinet Committee to define further a national transportation policy particularly in the area of regulation. We hope that the policy which this Committee will propose will be sufficiently clear and

definite so that all agencies of the Government will have less difficulty than at present in conforming to a national transportation policy.

In chapters III and IV we have discussed competition between Government operated transportation enterprises and [fol. 1194] the private carriers, the consequences of this competition and our recommendations. In this chapter we briefly discuss certain rate questions and the Government's representation policies in the light of the National Transportation Policy referred to above.

Section 22 of the Interstate Commerce Act

Our task force recommended that section 22 of the Interstate Commerce Act be amended "by eliminating the provision which authorizes the movement of Government passengers and property at free or reduced rates." They gave many cogent reasons for the recommendation. The Commission considered these carefully as well as the arguments against such action and concluded not to recommend amendment.

Filing of Rates

One administrative practice of certain Government shipper agencies, appears to us to be injurious to the best interests of the carriers, and perhaps of the Government as well, namely, the practice of keeping tendered section 22 rates secret until actual movement of shipments under the rates commences. This practice should be abandoned since it precludes open and orderly competition for government traffic.

Representation by Government Agencies Before the Interstate Commerce Commission

The Interstate Commerce Commission is the Government agency exclusively responsible for determination of the [fol. 1195] surface carriers' revenue requirements. It is required by law to authorize adequate and reasonable rates. However, in some proceedings before it where carriers have sought increases to meet revenue deficiencies, several Gov-

ernment agencies have appeared and introduced testimony and argument in opposition to the carriers' requests.

Some of these agencies appeared in compliance with statutory directives and some were motivated by direct interest. In one case, separate appearances were made by seven Government agencies. Our task force concluded that the agencies could be of help in determining issues by supplying facts and statistics upon the request of the Commission, or by appearing in their own behalf as interested shippers, but should not appear in favor of one private party against another.

Recommendation No. 21

(*a*) That the National Transportation Policy, as set forth in the Interstate Commerce Act, the Civil Aeronautics Act and the Merchant Marine Act, be studied and revised by the Congress to make it more definite and detailed. When this is done the Government in its capacity as a user of transportation should conform to that Policy with respect to its commercial-type traffic.

(*b*) That after negotiated rates for Government traffic have been fixed, they immediately be made public except to the extent precluded by national security considerations.

(*c*) That the regulatory agencies as necessary, make proper rules and regulations pertaining to movement of classified Government property.

[fol. 1196] (*d*) That regulatory agencies dealing with transportation be authorized to request the Department of Defense and the General Services Administration, and these agencies be required to furnish, unclassified facts and statistics to assist them in the performance of their functions.

[fol. 1197] DEFENDANT'S EXHIBIT "D"

Report on

TRANSPORTATION

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Prepared for the

COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

by the

SUBCOMMITTEE ON TRANSPORTATION

of the

COMMITTEE ON BUSINESS ORGANIZATION FOR THE DEPARTMENT OF DEFENSE

MARCH 1955

[fol. 1198] COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT

COMMITTEE ON BUSINESS ORGANIZATION OF THE DEPARTMENT OF DEFENSE

CHARLES R. HOOK, *Chairman*

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ROBERT E. WOOD

Consultants

RUSSELL FORBES
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SUBCOMMITTEE ON TRANSPORTATION ACTIVITIES IN THE DEPARTMENT OF DEFENSE

PERRY M. SHOEMAKER, *Chairman*
JOHN B. KEELER, *Director of Freight Study*
JOHN R. STALEY, *Assistant Director of Freight Study*
JAMES K. KNUDSON, *Director of Passenger Study*
SELIG ALTSCHUL, *Consultant*
ALVIN SHAPIRO, *Consultant*

[fol. 1199] LETTER OF TRANSMITTAL

WASHINGTON, D. C., *March 7, 1955.*

DEAR SIRS:

In accordance with Public Law 108, approved July 10, 1953, the Commission on Organization of the Executive Branch of the Government has made studies of the operation, organization, and policies of the Government in certain broad areas of governmental functions. This work has been prosecuted through the assistance of various task forces and of a Committee on the Business Organization of the Department of Defense. This Committee has several subcommittees engaged in the study of particular phases of its work.

The Commission transmits herewith to the Congress a report of the Subcommittee on Government Traffic Management and Transportation of the Committee on Business Organization of the Department of Defense, which report has the approval of the parent Committee. The conclusions and recommendations of this Subcommittee were reviewed by the Commission in reaching its own conclusions, but the Commission's own recommendations may not necessarily coincide in all respects with those of the Subcommittee. The Commission's report on this subject is also being submitted to the Congress.

The Commission takes this opportunity of expressing its appreciation to the Chairman of the Subcommittee, Mr. Perry M. Shoemaker, President of the Delaware, Lackawanna, and Western Railroad; to the members of the Sub-

committee and to their staff for the painstaking investigation made and for the preparation of this report.

Respectfully,

/s/ HERBERT HOOVER, *Chairman.*

The Honorable
The President of the Senate
The Honorable
The Speaker of the House of Representatives

[fol. 1200] LETTER OF SUBMISSION

January 14, 1955.

The Honorable HERBERT HOOVER, *Chairman,*
Commission on Organization of the Executive Branch of the Government,
General Accounting Office Building,
Washington 25, D. C.

MY DEAR MR. CHAIRMAN:

It is with pleasure that I submit herewith the report of the Transportation Subcommittee of the Committee on Business Organization of the Department of Defense.

The report is in two volumes; the first being the basic study of "Government Traffic Management and Transportation," and the second covering the special studies on (1) "Military Sea Transportation Service," (2) "Military Air Transportation Service," (3) "Panama Railroad," and (4) "Panama Steamship Line."

This Transportation Subcommittee report was submitted to the full Committee for action at its meeting of Tuesday, January eleventh, at which time it was discussed section by section and each recommendation voted upon individually. The Committee was unanimous in its approval of all sections of the report.

While this is the report of a subcommittee of the committee on Business Organization of the Department of Defense it relates to more than the activities of the De-

partment of Defense alone. For that reason you may wish to have your Commission act on it separately.

Respectfully and sincerely yours,

CHARLES R. HOOK, *Chairman,*
Committee on Business Organization of the
Department of Defense.

[fol. 1201] GENERAL COMMENTS

Scope of the Report

The primary responsibility of the Transportation Committee was to review the adequacy of traffic management and control of transportation expense in the various departments and organization of the executive branch, giving particular attention to evidence of government-operated transportation being to an undesirable degree in competition with commercial private operations (in view of an undiminished national need for continued availability of these commercial services). The study of the control of, and planning for, the transportation of persons was confined to the Department of Defense. Because of the specialized nature of its transportation operations, the Post Office Department was not included in the study.

In addition to the major study herein outlined, which broadly separates between the transportation of persons and the transportation of things, the Committee has given separate study to:

A. The Military Sea Transportation Service.
B. The Military Air Transportation Service.
C. The Panama Railroad.
D. The Panama Line.

The Committee's review of the Military Sea Transportation Service necessarily goes far beyond traffic management and into an apparent conflict, so far as the interpretation of current history is concerned, between certain policies of the defense establishment and policies of the Federal Government with respect to private business. The Military Sea Transportation Service is a combination of the former

separately operated sea logistics support for the Army and the Navy prior to 1949. The Department of Defense believes that it must command the absolute ability to move a planned minimum number of tons in a planned but limited period of time should a national emergency require it. With all previous history of the country confirming a dependence upon commercial shipping under emergency conditions and with a nonmilitary arm of the Federal Government, the Maritime Administration, under the Department of Commerce, required by law to assist the American merchant marine to exist in sufficient quantity and with sufficient quality to meet defense needs, the conflict with the military concept becomes apparent.

With respect to the Military Air Transportation Service, there is considerable parallel in principle with the Military [fol. 1202] Sea Transportation Service. It is relatively a new field. Development has been too rapid to wholly depend upon the evaluation of past history. Inescapable is the suspicion that future emergencies will give air transportation increasing responsibility for logistic support as well as for the movement of personnel. As a corollary, it would seem to follow that there may be decreasing importance for sea transportation of personnel and certain key lighter weight logistic materials. The magnitude of the Military Air Transportation Service may be indicated by the bare statement that the Committee finds 104,000 persons upon its payroll, covering, of course, all of the various responsibilities assigned to this particular command.

The Committee's study of the Panama Railroad and the Panama Steamship Line relates particularly to the economics of operation, the continuing necessity for these enterprises, and the extent to which service now provided may be replaced by available commercial transportation.

The broad scope of the responsibility of the Committee relates to the breadth of the supply pipeline of our entire military and civil establishment from the determination of requirements, to procurement, to initial transportation from source of supply into the distribution system, to storage depot (except for direct distribution), to secondary transportation to point of usage (posts, camps, stations,

hospitals, offices, etc.), and finally to utilization. It is apparent that transportation is an integral part of the supply pipeline, with the need for procurement of transportation as such being in substantial degree beyond the complete control of those responsible for traffic management.

Procedure

The study of the subject matter in its various parts has been carried out on the basis of:

A. Analyzing the immediately available material, including that in previous reports on the subject;

B. Developing what additional facts were needed to implement the purposes of the study;

C. Developing current facts through field trips, correspondence and conferences at the headquarters of the various departments involved;

D. Analyzing the material, reviewing tentative conclusions with certain of the more interested departments; and

E. Developing the completed report.

With almost no exception, the Committee has had splended cooperation from all Government departments. Exhibit U lists the more important offices visited or otherwise contacted.

The organization of the Committee's work necessitated [fol. 1203] the delegation of responsibilities. Acknowledgment by the chairman is made as follows:

For the Freight Study—

Mr. John B. Keeler, director (formerly vice president (Traffic), of the Koppers Co.)

Mr. J. Richard Staley, assistant director (vice president, The Quaker Oats Co.).

Dr. Virgil D. Cover, consultant (Professor of Transportation, Syracuse University).

Mr. Jesse B. McCorkle, consultant.

Mr. Sam H. Flint, adviser.

Mr. Leonard E. Galiley, assistant.

For the Passenger Study—

Mr. James K. Knudson, director (formerly a commissioner of the Interstate Commerce Commission and administrator, Defense Transport Association).

Dr. Hampton K. Snell, consultant (Professor of Transportation, University of Texas).

Mr. German S. Ellsworth, consultant, (formerly organization and management expert, Department of the Interior).

Mr. Benjamin M. Austin, consultant (loaned to the Committee by the Interstate Commerce Commission from his position as chief, passenger branch, bureau of traffic).

Mr. Ralph C. Buckingham, consultant.

Mr. Delbert M. Steiner, consultant.

For the Military Sea Transportation Service Study—

Mr. Alvin Shapiro, consultant.

For the Military Air Transportation Service Study—

Mr. Selig Altschul, consultant.

Mr. Grahame H. Aldrich, consultant.

Mr. Sam I. Aldock, consultant (loaned to the Committee from the staff of the Civil Aeronautics Board).

The preliminary report of the Transportation Committee was reviewed on November 4, 1954, by a committee of outstanding commercial traffic managers from American industry. Acknowledgment is herewith gratefully made for the advice and counsel of the below listed men who participated in this activity and so freely gave of their time on behalf of the work of the Committee. While there was general concurrence in the theory of the Committee's views on traffic management, it is not to be assumed that these men have concurred in the verbiage of the detailed report.

C. H. Beard, general traffic manager, Union Carbide & Carbon Corp.

Richard M. Boyd, general traffic manager, Pittsburgh Plate Glass Co.

H. J. Carroll, director of traffic, Goodyear Tire & Rubber Co., Inc.

Lee R. Cowles, traffic manager, Standard Oil Co. (Indiana).

H. C. Crawford, vice president (traffic), Bethlehem Steel Co., Inc.
A. P. Heiner, vice president (traffic), Kaiser Steel Corp.
Robert W. Marshall, director of traffic, E. I. du Pont de Nemours & Co.
E. G. Plowman, vice president (traffic), United States Steel Co.
H. D. Rhodehouse, general traffic manager, Republic Steel Corp.
G. H. Shafer, general traffic manager, Weyerhaeuser Sales Co.
[fol. 1204] K. L. Vore, general traffic manager, Westinghouse Electric Corp.
J. A. Wallace, director of traffic, Ford Motor Co.
D. G. Ward, director of traffic, Olin Mathieson Chemical Corp.

Additionally, the Committee has found it both necessary and desirable to have the support of various forms of commercial transportation, and acknowledgement is gratefully made for the cooperation given it by the:

Independent Military Air Transport Association, Ramsey D. Potts, Jr., president.
American Merchant Marine Institute, Inc., Walter E. Maloney, president.
Pacific American Steamship Association, Robert E. Mayer, president.
American Trucking Associations, Inc., John V. Lawrence, managing director.
National Association of Motor Bus Operators, Arthur M. Hill, president.
American Waterways Operators, Inc., Chester C. Thompson, president.
Air Transport Association of America, Earl D. Johnson, president.
Association of American Railroads, William T. Faricy, president.

Cost of Transportation

It is significant in the evaluation of transportation to recognize that its overall cost to the government is higher

than the budget of any Federal Department other than Defense, Treasury, and Agriculture; that its proper functioning is fundamental to present and future military supply as well as to the lifeblood of continuing domestic industrial development. Upon both stands our preeminence in world leadership.

The expense of the Federal Government for transportation of persons and property, as reported by the Bureau of the Budget for the fiscal year 1953, was approximately $2.6 billion. Knowing that some transportation expense does not appear in statistical separation for military expenditures and that, additionally, there is substantial transportation cost in Government material which is procured on a delivered-at-destination basis, it appears probable that the real total expense of the Federal Government for transportation (military and nonmilitary) in the fiscal year 1953 approached $3 billion.

Variety of Freight Movements

The evaluation of logistic support for the military together with changes in material requirements for other departments of the Government presents a transportation picture which, from the standpoint of variety, is not duplicated by any form of private business. Currently the number of items listed as procured, transported, stored, and further distributed by the more important department is as follows:

[fol. 1205]

	Items
The Army	1,200,000
The Navy	1,400,000
The Air Force	1,100,000
The Marine Corps	300,000
General Services Administration	60,000
Veterans' Administration	8,000

Many items in each supply system are common to one or more of the others, but in the Department of Defense alone, it has been estimated that the completion of the Federal cataloging program will still leave more than 2½ million different items in the supply system of the Military Es-

tablishment, carrying with it the technical handling involved in requirements planning, procurement, initial transportation, storage, redistribution, utilization, and disposal.

It is significant, from the standpoint of recognizing the importance of transportation as a vital part of the supply pipeline, that the military supply system presently involves 151 large depots in the continental United States, with 98 more overseas. The two related groups together serve some 2,600 bases and facilities worldwide. There are some 55 central control locations for inventory control, these points, in general, having commodity and item responsibility within the respective services. Additionally, the General Services Administration has 12 depots serving domestic needs; the Veterans' Administration has 3.

What Is Traffic Management

From the standpoint of this report, traffic management, as differentiated from the control of traffic responsibilities at the field or operational level, may well be defined as the responsible supervision for the movement of persons and goods in accordance with time element necessities and with appropriate integration of movement planning, reasonable rates, control of overall costs, control of loss and damage, economics of facility locations, development of improvements in service, review of handling procedures, participation in procurement considerations and active adherence to national transportation policy.

There is a lack of understanding in Government circles of the distinction between traffic *management* functions and traffic *operational* functions.

Centralized traffic *management* for Government should function primarily in the field of rate negotiations, control of routing, research and study of Government traffic movements, representation of the Government in proceedings before regulatory agencies and carrier rate bureaus, and in the performance of other duties related to the *"control* and *management"* of traffic.

In the various field offices there is often need of traffic personnel to perform such routine functions as preparing [fol. 1206] bills of lading, checking freight rates, expediting or diverting shipments, and selecting routes and modes of

transportation (within the framework of routing policies prescribed by centralized traffic management). These are operating functions.

The situation is analogous to that of a commercial firm with multiple plant operations where the general traffic manager and his staff at headquarters *control* the company's traffic by performing traffic *management* functions and, at the same time, traffic men at the various plants perform the operational functions incidental to the day-to-day handling of traffic. These operating people are responsible to the head of the traffic department for such policy matters as routing and relations with carriers, even though they are carried on the payrolls and are under the disciplinary supervision of local plant management.

The Committee conceives the responsibility of a Government central traffic management office to be nearly identical with that of an industrial traffic organization. Traffic personnel needed to facilitate the operations of an individual Government department, service, or installation should be on that department's payroll and subject to its disciplinary jurisdiction, but under the *supervision* and *control* of the central traffic department so as to insure the observance of uniform traffic policies and procedures. There would be a clear line of demarcation as to the functions which the operating personnel would perform. This would preclude them from negotiating rates; limit their authority to route shipments to the extent determined by central traffic management, and subject their methods of keeping records, preparing shipping documents, etc., to inspection and approval of the central traffic office.

The fact that the Federal Government has a variety of traffic movements is not a real complication. A commercial concern may have many types of plant operations at widely separated localities producing basic materials as well as numerous and diverse finished products. Traffic *management* is responsible for seeing that each of these varying types of operations is furnished with traffic personnel trained to deal with the particular and peculiar requirements of the individual operation.

In industry one of the most fruitful sources of economy is study of traffic operations at the plant level. Only a

centralized traffic management service with a broad perspective, highly trained staff, and an opportunity for comparing methods and results is equipped to detect practices which are expensive and wasteful of time and manpower. The same principles apply to Government.

Historical Background

It is appropriate to note that prior to the work of the first Hoover Commission, whose task-force report on the [fol. 1207] Federal supply system in January 1949 gave extensive consideration to traffic management, some 25 years had passed with passive acceptance of the conclusions of the Director of the Budget and the first Comptroller General that there was a lack of traffic control and traffic management within the Government resulting in both excessive transportation and excessive payments to carriers. The first Hoover Commission report pointed up sharply the lack of any recognition in Government of the savings to be accrued from effective traffic management and the fact that at no time had there existed within the Government any centralized system of traffic management control.

As early as 1912 governmental concern over excessive transportation costs led to the organization of a Transportation Committee, but because of its peculiar advisory capacity, it failed to provide adequate procedures or correct the evils found.

In 1921, as in the period immediately succeeding World War II, the tremendous sums of money involved in Government traffic expense brought public attention to its magnitude. The Director of the Budget at that time made a report to the President that between $50 and $60 million per year were being paid in overcharges. This report led to the establishment of the Federal Traffic Board in the Office of the Chief Coordinator of the Federal Coordinating Service. Its purpose was to effect economical and better business management in the government with respect to transportation charges. While the Coordinator for Traffic was charged with supervision of all Government freight, express, and passenger traffic of the various departments and agencies and for negotiations with the carriers, during

the period this Board furnished its services there were continuing and successful endeavors upon the part of most departments to deal independently with their traffic problems, and apparently for one primary reason, the lack of power by the Board to enforce compliance with its decisions or recommendations.

In 1933 the Federal Coordinating Service was abolished and a Procurement Division in the Treasury Department established, with the duties of the Federal Traffic Board being transferred to that organization. During the period 1935 to 1940, personnel assigned to the Traffic Section reached a high point of 75, but most of its activities were in connection with emergency relief and there never was sufficient personnel to permit adequate performance of the principal coordination and traffic management functions. By the middle of 1940, the staff of the Traffic Section had been reduced to 16, with the result that the Procurement Division informed other departments and agencies using its traffic service that the Division could no longer assist them in this respect.

In 1942, Bureau of the Budget Circular No. 387 was issued creating a central traffic section in the Procurement [fol. 1208] Division to provide government agencies with such technical information as they might require. Because of the nature of their shipments during this war period, the military, the Agriculture, and the Post Office Department were expected to maintain their own traffic control units, and this was likewise true of the Maritime Commission. This central traffic section never reached a personnel level permitting a modest approach toward effective accomplishment of its duties. As wartime emergency appropriations lapsed, the staff of this group was reduced to 16 and remained in existence, functioning but meagerly until the establishment of the General Services Administration as the result of the first Hoover Commission's report.

The first Hoover Commission found that the then existing system of traffic management by each of the agencies individually did not permit an examination of the traffic of the Government to determine areas of unreasonable transportation costs. The Commission found that, while some of the larger agencies apparently had sufficient traffic vol-

ume to warrant such research, it was not being performed and they were principally concerned with the service function as a result of limitations imposed upon their personnel complements. Emphasizing the opportunities for research, for improved traffic management by effective standardization of policies to provide improved control over routing, the Commission recommended the establishment within the executive branch, as a part of the central supply organization, of a Traffic Management Division, adequately staffed with experienced personnel and headed by a traffic manager with a wide experience in traffic management.

As an example of the findings from the detailed report submitted by the Federal supply project to the Commission on Organization of the Executive Branch of the Government, dated September 28, 1948, the following illustrates the situation obtaining:

> * * * During the war period the degree of cooperation was very limited. Many instances were found in which one agency negotiated for and obtained a special quotation under section 22 or 217 (b) of the Interstate Commerce Act on a particular commodity for its own account while other agencies continued to pay full commercial rates on similar movements of the same commodity. In one case, the Metals Reserve Company, which was stockpiling a strategic metal, obtained a special rate which reduced the cost per carload from approximately $3,200 to $1,200. The Bureau of Federal Supply (then the Procurement Division) continued to ship the same commodity at full commercial rates for 2 years before the existence of the special rate was called to its attention. In another instance, a special rate was obtained by one agency for the movement of office equipment and records when various of its activities were being moved away from Washington. Other departments and agencies, subject to the same program of decentralization, shipped at full commercial rates * * *.

The extensive section of this report dealing with the transportation of property will describe the limited extent to which the recommendations of the first Hoover Commis-

[fol. 1209] sion have been successfully placed into effect in the nonmilitary departments. While Agriculture was omitted from central traffic management by statute, the military was left on a permissive basis with the result that the military's traffic management, as a generalization, has functioned independently of the centralized traffic management placed under the General Services Administration.

It is appropriate to point out that the Defense Department, in the postwar years, has made numerous studies and has placed into effect some reorganization of its traffic management functions. Recognizing some of the weaknesses in the control of military transportation during the period of World War II, and recognizing the increasing desirability of some coordination of transportation policy between the military services, in 1950, the Secretary of Defense established the Military Traffic Service as a policy organization, with its director reporting to the Secretary of Defense.

In 1953, the Secretary of Defense abolished the Military Traffic Service and established the position of Director of Transportation and Communications, reporting to the Assistant Secretary of Defense, Supply and Logistics. The effectiveness of these changes within the organizational structure of the Department of Defense will receive appropriate comment in the detail of the report covering the transportation of property and the transportation of persons.

In the more specialized field of the Military Sea Transportation Service, which has only been in existence since 1949, replacing as it did at that time the separately operated Logistics Sea Service of the Army and the Navy, the Committee considers itself fortunate to have had the benefit of the very complete hearings conducted in 1954 by the House Committee on Merchant Marine and Fisheries.

In connection with the Military Air Transportation Service, the Committee found little historically helpful information and substantially no record of detailed congressional review, even in the Appropriations Committee hearings.

With respect to the Panama Line and the Panama Railroad, the Committee calls attention in its detailed report, to some of the pertinent history having to do with the changes created by the canal in what was initially estab-

lished as a private enterprise steamship and railroad operation.

Preliminary Consideration of Transportation Practice

Because this report suggests changes, no person should assume that the Transportation Committee has found all Government control of transportation expense to be bad or incompetent. In the non-military field, the traffic management organizations of the Tennessee Valley Authority and the Atomic Energy Commission were found to be [fol. 1210] outstandingly good and their functioning almost beyond criticism. A not inconsiderable measure of commendation is properly due the military services for their respective attention to transportation and traffic management. As a generalization, the areas of criticism found by the Committee in the Department of Defense relate not to the sincerity or the interest of officers and civilians entrusted with traffic management, but to the overall plan of organization which by its inherent characteristic contains duplication, inefficiency, waste, and, in many cases, a lack of the checks and balances so important to the administration of any functional department in private industry.

Basic principles of traffic management vary little with the commodity requiring transportation and distribution. The opportunities for competent traffic management to effect improvements in service and control of cost for transportation exist with respect to all of the items in the supply line of the military and nonmilitary departments, but no better opportunity to visualize possibilities is available than from an analysis of the situation involving food and clothing, which constitute the more important parts of the subsistence field. The best traffic manager in commercial business has but limited opportunity to effectively use his talents if procurement decisions are made without coordination with transportation costs and if the warehousing and distribution blueprint of his company is not directly geared to minimize the transportation expense involved in both initial and final distribution. Important to the traffic manager in commercial business is the responsibility to control his entire traffic pattern regardless of departmental lines. It is no less true in Government, except that the benefits

of analytical planning, which incorporates a recognition of the importance of transportation in the entire supply pipeline, go beyond the usual opportunities of industry.

Transportation of Subsistence

Today there is virtually no article of commerce which the Government does not use in greater or lesser quantity. Today there are few parts of the world to which or from which the Government does not move persons and/or property. Subsistence is of pertinent interest because perishable foodstuff involves problems of service generally more acute than those applying to nonperishable commodities. Nonperishable foodstuffs, which in many cases relate to seasonal packs of canned goods, offer within the realm of careful inventory control and carefully preplanned distribution challenging opportunities for the control of transportation dollars.

In the handling of subsistence, as is true of all other types of Government materiel, the control of transportation service and expense is an important segment of the distribution system. It is the same kind of a dollar supplied by [fol. 1211] the taxpayer to procure subsistence that is used to procure transportation. If transportation is looked upon as a manufactured commodity, subject to the refinements of quality and cost which our industrial machine has made applicable to most manufactured goods, it is easy to visualize that transportation is an important segment of the dollar cost of subsistence and that failure to plan procurement, distribution, storage, redistribution, and disposal on the basis of integrating transportation expense can develop wastage of dollars, the magnitude of which relates to the magnitude of subsistence itself. In other words, effective traffic management is an important element of cost control.

All know the axiom of geometry that a straight line is the shortest distance between two points, but all too few recognize that, in its application to transportation, this might be paraphrased as any unnecessary movement costs money, whether it be within a warehouse or cross-country on a truck or freight car. This emphasizes that crosshauling and backhauling which can be avoided by integrating with

transportation the matter of procurement, distribution and utilization provides a major element of cost control. With the availability of competing forms of transportation, the complications of the rate structures of each, the evaluation of the time element involved in various kinds of transportation, and the potentialities of combining smaller volume shipments into truckloads or carloads, it becomes obvious that traffic management is a professional assignment requiring experienced judgment and the tools for competent analysis.

Government traffic management has a long history of inadequately fulfilling the potentialities of its function, and no better illustration of this obtains than those currently available in the subsistence field. A staff report of the Subsistence Supply System for the Munitions Board made in the spring of 1953 had an important section on distribution and storage. This report emphasized the beneficial opportunities involved in area distribution of subsistence and strongly urged the avoidance of depot rehandling by shipping maximum quantities of nonperishable subsistence directly to consuming activities. It indicated the transportation of a seasonal pack of canned salmon from the west coast cross country to Bremerhaven via the east coast at almost twice the transportation cost had the same movement gone from the west coast to Bremerhaven by all-water shipment. An analysis of a seasonal pack of canned peaches showed the same result.

A comparatively recent observation by members of the subsistence task force at New York developed a quantity of sugar being purchased at refineries in New York, shipped to the Army depot at Schenectady, only to have much of it backhauled with one particular carload being wanted for redistribution at Fort Totten, N. Y., so quickly that it was not even opened and unloaded at the Army depot but re- [fol. 1212] turned intact. Such illustrations as this resulted in the type of instructions shown as exhibit D to effect greater direct distribution and less warehousing.

Munition Board Study of Subsistence

The Munition Board's study of subsistence in May 1953 developed pertinent revelations on the crosshauling of sub-

sistence. Following this report, the Army and the Navy entered into joint agreement that year known as the Horkan-Royar agreement providing for a periodic recheck of shipments from vendors' storage depots of canned fruit and vegetables and encouraged interservice depot transfers of all subsistence in order to better distribute supplies among and between the services. The agreement provided that cross-servicing between consuming activities and proximate distribution points would be established. This is of great interest to the Transportation Committee because the result of such a desirable evolution in supply management places an effective tool in the hands of traffic management, if the importance of the function is recognized and utilized.

Unified Distribution Opportunities

One of the early results of the Horkan-Royar agreement was an arrangement under which the naval air station at Corpus Christi, Tex., would receive nonperishable subsistence from the nearby Army depot at San Antonio, rather than from Norfolk, Va. These installations were visited and it was found that the cross-servicing arrangement was working out admirably. Disconcerting is the knowledge that despite the Horkan-Royar agreement, which is so basically consistent with Department of Defense Directive 4000.8 of September 5, 1952, covering the military supply system, the arrangement has been ignored with the establishment by the Navy of a distribution point at New Orleans serving the relatively distant points of Memphis, Tenn., Dallas, Tex., Orange, Tex., Norman, Okla., Pensacola, and Jacksonville, Fla. With such clear evidence of potentially satisfactory supply and control of transportation expense, the Committee is not satisfied that the economic potentials have been realized by New Orleans serving; for example, the naval air station at Memphis (some 394 miles away) with an Army depot handling subsistence but a few miles away; with a naval air station at Dallas being served from New Orleans (some 520 miles away) with an Army depot located but 32 miles away at Forth Worth.

It would appear on the surface that common use items, and most of subsistence fall into this category, offer the

[fol. 1213] maximum in opportunities for cross-servicing and thus realization of the ultimate transportation saving inherent in such procedures.

Wasteful Transportation

The Committee questions the flying of ping-pong balls from Westover Field to Berlin; and the flying of cement, in a 25,000-pound shipment, from this country to an Air Force base at Bermuda. It seems apparent to the Committee that the command services in the field ordering such transportation have but little appreciation of its cost. It appears to the Committee that the apparent reluctance of the services to implement DOD Directive 4000.8, particularly with respect to section 3.7, indicates a lack of appreciation of the reality of transportation dollars.

If subsistence can be interpreted to include canned dog food, then the orders of a theater commander requiring the Military Air Transportation Service to fly a substantial quantity of it from the west coast to Okinawa seem to offer an appropriate subject for examination. Few people would question the net result of this being that certain dogs in Okinawa had available to them dog food at an overall cost per pound probably setting a world's record.

The Transportation Committee has noted with concern the large amount of perishable procurement being handled by the Market Center at Chicago, which has the responsibility for perishable procurement for all of the armed services, being bought f. o. b. destination; in other words, on a delivered basis insofar as freight charges are concerned. In some instances the Market Center has found it practicable to ask for bids on both a delivered and an origin basis, thus evaluating the difference, which is sound analysis. But when our bidding system, as it does, results in the Government buying turkeys in the Midwest producing district for Norfolk, Va., and buying Virginia turkeys for use at Midwest military installations, some one is paying the cost of such crosshauling. It is hard to visualize this someone not being the taxpayer.

It is not to be assumed that all of these illustrations are the result of negligence, but the evidence is clear

that our existing system has not provided an integration of inventory control, procurement, and distribution with transportation successful enough to avoid substantial wastage of transportation dollars. Furthermore, it is fair to point out that special purpose legislation frequently hampers procurement and transportation efficiency. As one procurement officer said, part in dismay and part in frustration:

> After I have given consideration to giving part of my orders to small-business enterprises, given due attention to distressed labor areas, given proper opportunity to manufacturing facilities in Federal prisons and followed all of the ramifications of com- [fol. 1214] petitive bidding, the opportunity left to consider geographical procurement in relation to transportation and distribution costs is limited.

In no part of the Government supply system for the military does the benefit of coordination between procurement and distribution seem to offer more promise than in the subsistence field. Coordinated procurement of foodstuff for the military services has been largely achieved. Controlled distribution, taking full advantage of cross-servicing opportunities, offers promise.

The Veterans' Administration maintains three depots—Somerville, N. J., Hines, Ill., and Wilmington, Calif. These depots provide storage and issue functions for 235 hospitals, domiciliaries, homes, and Offices. About 70 percent of the volume of shipments consists of nonperishable food, and 30 percent medical and general supplies.

Nonperishable supplies are purchased from vendors throughout the country, f. o. b. Veterans' Administration depots. These supplies are, of course, then shipped as required to its installations located in each of the 48 States; yet GSA has 12 stores depots located throughout the country, many of which are located considerably closer to the consuming activities. In addition, the military has 30 subsistence warehouses located throughout the country, many of which are also closer to consuming activities.

This discussion illustrates but a few of the possibilities in the way of saving transportation costs if Government

departments were required to secure their supplies from the nearest available supply point and the supply points were authorized to furnish supplies to departments other than the controlling department.

Fundamental to the control of transportation dollars must be the realization that transportation, whether it be that of persons or things, is in itself a commodity which is planned, manufactured, and sold in a competitive environment on the marketplace as a very real part of the social and industrial evolution which has brought strength to this country.

The dollar used for the purchase of transportation should be controlled just as meticulously, and those entrusted with their spending should be held no less responsible for exercising prudent and competent management than is true of the Government officer procuring any other item in the supply system.

Military vs. Private Enterprise Point of View

The Committee finds it necessary to comment on one further feature of transportation control within the Department of Defense from the standpoint of what may be considered "the military mind." On the one hand, we presently have a concept of topside civilian control in the Department of Defense, but on the other, with career [fol. 1215] officers of the military responsible for carrying out the military functions of that Department. That this has resulted in conflict is apparent to all students of organization of the Department.

The Committee has interviewed many officers in the various services and, as a broad generalization, they are almost without exception fine and competent men, carrying out their responsibilities with sincerity and loyalty from the point of view with which they have been indoctrinated. Most military personnel have been schooled from their early days in each service that the military commander must have absolute control of his supply line. It is a carryover of that thesis that results in the desire of the military to keep separate service control of their respective supply lines and thus separate control of trans-

portation as it affects each of our main military functions. Thus with the zeal of tradition and long training we find the military fighting to maintain the integrity of this concept.

It adds a tremendous dollar cost to the taxpayer. It is contrary to the principles of unification. It is contrary to the principles of good business management as practiced in industry. And, certainly, with the increasing tendency for some parts of the military to establish their own transportation systems there is a real conflict with public interest.

It is the belief of the Committee that this entire situation should be clarified to the end that, given reasonable continuity of civilian control in the staff function of the Department of Defense, there can be an activation of policy which will not impair the supply function to the military commands and yet which contrariwise will meet the ordinary tests of good management. There must be recognition that when an emergency comes the military cannot depend upon a self-contained system for transportation, or any other part of its supply pipeline, but must depend upon the complete cooperation and integration of commercial enterprise of all kinds with the military. This occurred in World War I and World War II. It is inevitable in our kind of society that we must depend upon its again becoming a full reality when and if the bell tolls.

[fol. 1216] NATIONAL TRANSPORTATION POLICY

Government has the moral obligation to observe in its acts, policies which its people have established through our legislative process. Traffic management of Government should have the responsibility for observance of national transportation policy.

The responsibility of Government traffic management for observance of national transportation policy stems also from the fact that the Government is a substantial user of transportation services. The interest is as obvious as the proven importance of transportation to national defense, and there is no question dependable economical transportation is the foundation of our economy.

In the Transportation Act of 1940, the Congress enunciated as a preamble to the Interstate Commerce Act the following national transportation policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.[1]

Of particular pertinence are the enjoinders to preserve the inherent advantages of each form of transport, to foster sound economic conditions, and to discourage destructive competitive practices. It would indeed be anomalous if the Government should maintain one policy and one set of objectives with respect to its regulation of transportation and concurrently maintain another policy and a different set of objectives with respect to its use of transportation.

Yet that appears to be exactly the state of affairs today. The attitude toward national transportation policy of the various Government agencies and departments having traffic management functions is characterized by lack of

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[1] Congress has made other statements of similar policy under the Civil Aeronautics and Maritime Acts.

uniformity, lack of conviction, and lack of understanding. These attitudes range all the way from the Atomic Energy [fol. 1217] Commission's positive assertion of responsibility toward national transportation policy at one pole, to a number of agencies at the other pole which assert, and clearly demonstrate by their actions, that they feel no responsibility.

In between, for example, DOD Directive 4500.9 states:

> In determining the mode of transportation to be utilized:
>
> 1. The least costly means shall be selected, having in mind safety, expedition, equipment supply, procurement regulations, military necessity, and the national transportation policy.

Significantly, national transportation policy is ranked last.

Certainly, nothing in this directive would give any clue to a local transportation officer as to how freight should be routed to achieve recognition of the Nation's declared policy toward transportation agencies.

Other things being equal, the Army discharges its responsibility by attempting to divide domestic freight transportation requirements 50–50 between railroads and motor carriers despite the fact the Nation's commercial traffic is divided quite differently.

The Air Force and the Navy are using military-operated and contract freight and passenger transportation to an increasing degree and evidence little feeling of responsibility for preservation of the Nation's privately operated transportation system.

General Services Administration has been fortified in its disregard of national transportation policy by a letter from the Acting Comptroller General, dated April 13, 1951, which states in part:

> It is believed, therefore, that the effect of * * * the proposed regulation, relating to "*national transportation policy*" would be to impose an unwarranted

> burden upon interested Government agencies in their negotiations of reduced rates and that it may prejudice the rights of the United States to benefits tendered or available to it under specific statutory enactments. So far as the matter may be for official consideration by this Office in connection with the audit of said accounts or otherwise, it is considered necessary that the validity and effect of reduced rate tenders or other concessions offered the Government under the provisions of section 22 of the Interstate Commerce Act, and comparable provisions relating to transportation facilities other than railways, be determined independently of the provisions establishing the national transportation policy.

While this letter appears to have rather restricted application. GSA traffic management has construed it as exempting all Government traffic management activities from influence by the national transportation policy. The Committee, in an effort to determine the validity of GSA's position, specifically asked the Comptroller General, first, if he considered that Federal traffic managers have responsibility for the national transportation policy, and, second, whether the previous ruling should be construed to mean that enforcement of, or compliance with, the national transportation policy is not a function of traffic managers of the Federal Government.

[fol. 121[3]] His reply, in part, stated:

> In view of what has been said above, the answer to the first specific question on page 2 of your letter is that the requirements of the national transportation policy are believed to be too comprehensive and indefinite to permit any satisfactory application by traffic managers for the Government in the discharge of their function in procuring transportation services. With respect to the second question, you are advised that it was and is the considered opinion of the General Accounting Office that traffic managers of the Federal Government are not charged directly with responsibility for the enforcement of the national transpor-

> tation policy, and that any attempt on their part to give it effect in procuring services or proper rates for the Government would result in uncertainty and confusion in the award of Government business, with understandable protest and objection from the carrier or carriers tendering rejected lower rates.

The lengthy response received to this inquiry also suggested that Federal traffic managers cannot be charged with responsibility related to national transportation policy, because that, inferentially, is solely a responsibility of the Interstate Commerce Commission:

> It is not understood, however, how administrative officials of the Government can assume to determine that rates voluntarily tendered by the carriers should be rejected because in the opinion of Government personnel involved, the rates may not be sufficiently productive of profitable revenue.

A diametrically opposed view was expressed by the Senate Appropriations Committee in July 1954.[2] In commenting on activities of Government agencies in two areas relating to national transportation policy (appearance before ICC in general revenue cases and negotiations with carriers for section 22 rates—lower than normal tariff rates), the Committee clearly indicated its belief that Government agencies were jeopardizing the ability of carriers to maintain an adequate transportation system. The discussion concluded with an unequivocal mandate:

> Accordingly, all Government agencies and executive departments are admonished to pay full heed to the national transportation policy in their dealings with the carriers.

Certainly many Government traffic management philosophies are directly inconsistent with the national transportation policy. The improper use of section 22 of the Interstate Commerce Act, which is discussed elsewhere in this report, is unquestionably conducive of destructive

[2] S. Rpt. 2034, Supplemental Appropriation Bill, 1955.

competitive practices which the policy condemns. The continual application by certain agencies of pressure to encourage quotation of rates below a reasonable level does not foster "sound economic conditions in transportation" which the policy seeks.

The same lack of regard for national transportation policy is to be found in passenger traffic management of Department of Defense. A major problem is the increasing use by the Defense Establishment of unregulated air carriers. Awards for organized group movement are based [fol. 1219] on the lowest charge which can be obtained through invitational bids. A carrier which is in a position, because of quality of equipment, below value rental of equipment or other unusual circumstances, through a low bid which may approach, if not undercut, common carrier costs, can divert to itself substantial amounts of traffic. It is questionable if such practices are in the direction of—

> * * * preserving a national transportation system * * * adequate to meet the needs of * * * the national defense.

When the advantage is an artificial one stemming from differences in philosophy or practice of regulation or promotion, it is not economically consistent with the national transportation policy.

Bidding practices under present rate regulation and lack of regulation are leading and can continue to lead only to destructive competition and to unprofitable operations, especially if the volume of military traffic declines.

Since 1945 there have been several so-called general revenue proceedings before the Interstate Commerce Commission, wherein carriers have sought across-the-board increases in rates on all traffic to meet revenue deficiencies. Although the Interstate Commerce Commission is the Government agency exclusively responsible for determination of the surface carriers' revenue requirements and although the Commission is required by law to authorize adequate and reasonable rates,[3] in most of these proceedings sev-

[3] Interstate Commerce Act, secs. 1 and 15 (a).

eral different Government agencies have appeared and introduced voluminous testimony and argument usually in opposition to the carriers' requests.

Some of the agencies appeared in compliance with statutory directives,[4] others by interpretation of statutes delineating their responsibilities, and still others apparently out of gratuitous sense of duty to the public.

In one case[5] separate appearances were made (often by several counsel and witnesses) on behalf of:

Attorney General of the United States.
Secretary of Agriculture.
Secretary of Interior.
Secretary of Commerce.
Economic Stabilization Agency.
General Services Administration.
Tennessee Valley Authority.

Some of the appearances were motivated by a direct interest in the level of freight charges which the appearing agency paid, but most of the agencies participated purely as advocates of the "public interest."

[fol. 1220] This duplication of effort is expensive; presentations were of doubtful value;[6] most important this activity of Government as an advocate poses a serious question of policy for it places the Government in the untenable position of representing one group of citizens, opposing another, and judging the case all at the same time.

No doubt many of the agencies could be helpful in the determination of issues before the Commission if their activities were confined to supplying factual, statistical matter when requested to do so. Clearly, the views of this Committee, if adopted, with respect to concentrating all Government traffic management functions in two organi-

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[4] I. e., Agricultural Adjustment Act, sec. 201; Agricultural Marketing Act, sec. 203.

[5] *Ex Parte 175, Increased Freight Rates*, 1951, 280 ICC 179; 281 ICC 589.

[6] The Commission authorized the full increases sought.

zations, would make available to the regulatory commissions all necessary information.

[fol. 1221] GOVERNMENT TRAFFIC PERSONNEL

Any substantial improvement in traffic management functions unavoidably involves solution of personnel problems both quantitative and qualitative in nature.

The report of the first Hoover Commission recognized that Government traffic management personnel are not compensated on a basis comparable with that obtained in private industry.

Early in the Committee's study it became evident that classification standards established by the Civil Service Commission for the traffic management series do not permit employment of personnel with the qualifications necessary for Government traffic offices to perform the functions expected of competent traffic management.

While Government can train personnel in the lower grades, it must recruit traffic management personnel largely from commercial industry. This is difficult and frequently impossible, since the rates of pay for the same type of work in commercial industry are so much higher than permitted under Civil Service Classification Standards. Frequently, too, the more promising junior employees will, after adequate training in Government work, resign to accept employment with commercial industry at a greater salary.

The deficiencies of Civil Service Commission Classification Standards applied to personnel of many governmental departments have been recognized.[1] While the class of employees performing traffic management functions and coming within the traffic management series may not have been specifically mentioned, certainly they constitute one of the most highly competitive classes with outside employment.

In mid-1951 some governmental departments (more particularly the Department of Defense) entered into an ex-

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[1] S. Doc. 34, 83d Cong., 1st sess., presented by Senator Olin D. Johnston, March 18, 1953, entitled "Administration of the Classification Act of 1949 and the Compensation Process established by the Act."

tensive study of the classification standards applied to transportation and traffic management personnel. Numerous conferences were held between representatives of the Department of Defense and the Civil Service Commission during 1952 and 1953, and DOD supplied comparative data and functional studies along with a proposal to revise the standards. The proposal was rejected by the Civil Service Commission apparently because of inadequate appreciation of the value and importance of traffic management.

[fol. 1222] From the quantitative standpoint it appears to the Committee that an increase in expenditures resulting from higher salaries could be offset by a reduction in the number of personnel. Exhibit II shows, for the military services and for the principal civilian agencies having traffic management functions, the number of personnel and the payroll expense related to the volume of traffic handled. Particular attention is directed to the average traffic administrative salary cost per $100 of freight charges. While this ratio for some departments would compare favorably with private industry standards (not exceeding 2 percent), there are examples of administrative costs as high as 12 percent.

Certainly the staff required to supply central traffic management service for the civilian agencies only could be substantially smaller than the combined staffs totaling 567 which now perform civilian agency traffic management work. Likewise Department of Defense traffic management, on the basis of integration of facilities and functions, could permit a substantial reduction in the traffic management staffs of the military agencies.

A further factor affecting the quality and continuity of traffic management and directly affecting the quantity of manpower management is the practice within the military services of frequent officer rotation. When this situation in key military positions within the traffic management organzation is integrated with a similarly disturbing policy with respect to rotation of procurement personnel, there is involved a situation where the best of management intentions can be, and often are, defeated by inexperience and lack of understanding. Just as procurement is highly specialized, the professional administration of traffic man-

agement returns administrative efficiency in direct ratio to the quality of its heads. It is the belief of the Committee that the effect of present policies of rotation within each of the military services could be carefully examined from the standpoint of the problem herein outlined.

[fol. 1223] SPECIAL GOVERNMENT RATES

A factor contributing to the complexity of the Government traffic management problem is the availability of rates on Government traffic different than those applicable on like commercial traffic.

Section 22 of the Act to Regulate Commerce provides:

> That nothing in this part[1] shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, or the transportation of persons for the United States Government free or at reduced rates • • •

This provision, substantially as it is today, was in the original act of 1887. Among principal reasons for section 22 was permission to establish free or reduced rates in times of disaster, such as floods and drought, and to allow non-land-grant railroads to meet the rates of land-grant carriers when they desired to do so.

Relatively little traffic moves on section 22 quotations under disaster circumstances. In 1940, Congress limited land-grant deductions to military traffic, and in 1946 abolished them entirely. Beginning in 1940, and to a greater degree after 1946, section 22 rate quotations have become the media for the movement of a very substantial proportion of all Government traffic, both military and nonmilitary. Thus section 22 is used today for purposes different from those originally contemplated.

The use of section 22 is a legitimate concern of the Committee because: (1) its direct effect on Government traffic management procedures; and (2) its effect on ability of

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[1] Sec. 22 is in part I of the Interstate Commerce Act applying to railroads. However, by references contained in secs. 217 (b), 306 (e), and 405 (c) it is also made applicable to highway and water carriers and freight forwarders.

the Nation's transportation system to supply the Government with necessary service. The practices of some Government agencies, in using section 22, also affect governmental supply functions and place suppliers in an undesirable state of uncertainty.

Effect on Transportation System

There is little uniformity among the various Government agencies in the handling of section 22 quotations. Regardless of intentions, the effect of the procedure in many departments is to foster destructive competitive practices. While the Army and the Navy reveal all accepted special quotations, some other departments disclose special rates only upon specific inquiry by interested parties.

[fol. 1224] When GSA receives a quotation, it keeps the reduced rate secret until the first lot of tonnage subject to it comes up for routing. At that time it reveals the special rate by placing a routing order in its file, but the carrier offering the reduced rate is given the entire movement even if other carriers meet the rate as soon as they learn of its existence. Later, if another block of tonnage comes up for routing, the carriers meeting the rate will be given an opportunity to participate, unless in the meantime another secret and lower offer has been made, in which event the low-bidding carrier would be given the entire movement.

An example of rate cutting which this system encourages is the story of cobalt metal moving from Niagara Falls to Guilderland Center, N. Y. Exhibit 1 presents the chronological story of rates established on this movement between November 29, 1952, and April 16, 1954. Cobalt metal is extremely valuable (about $5,200 per ton) and the normal rate was 101 cents per 100 pounds. Yet at the time these facts were developed the rate had been depressed to less than one-half that amount and there is legitimate doubt that the carriers are now receiving adequate revenue on this traffic in relation to other rates.

Most of these reductions were unsolicited, in the sense they were not specifically requested, but the policy of GSA

to reward the rate-cutting carrier with exclusive right to handle the traffic is directly productive of such rate-cutting practices. There is no question the Government is entitled to reasonable rates on its traffic, but it should be prohibited from sponsoring destructive competitive practices which, in the final analysis, will weaken the Nation's transport system.

In the movement of passengers for the Department of Defense, similar bidding practices are encountered, especially where group movements are concerned. Despite a deficit from passenger operations which has exceeded one-half billion dollars for each of the past several years, the railroads offer a 10-percent discount below published fares on *all* military travel. Scheduled airlines likewise grant the military services a 10-percent discount, and buslines, with somewhat lower regular fares, make a 5-percent discount.

Competition for group movements appears to be mostly between the railroads and nonscheduled airlines. Since September 1953 the railroads, including Pullman, have submitted bids to the military services in response to advance notice on group movements of 15 or more persons, using section 22 to make lump-sum quotations resulting in charges lower than either the regular or discounted fares. This action was necessitated by competitive bids of those few air carriers which operate under part 45 of the Civil Aeronautics Act and are subject to no rate regulation. These lines generally bid through carrier associations. Some movements of military groups are made by regulated air carriers on a charter basis. Their charges are [fol. 1225] based on a rate per line-mile (e. g., $1.25) and a lower rate per ferry-mile (95 cents) required to position the aircraft. Because the computation of ferry-miles depends on actual or estimated positioning of the aircraft, it is not possible to determine the charge for any specific movement simply by reference to the tariff.

Effect on Government Agencies

The various departments and agencies are flooded with reduced rate tenders designed solely to enable some car-

rier or group of carriers to capture Government business. Evidence indicates that, for some agencies, at least 90 percent of all section 22 rate tenders fall into this category. In many cases the reductions offered are but slightly under the published rate. (Exhibit 1 shows an example of a reduction of six-tenths of a cent per 100 pounds which was sufficient to control the entire movement for some time.) The cost to the affected departments of keeping records of these reductions and disseminating information to field offices frequently may exceed the savings in freight charges which they produce. Additionally, these rapidly changing quotations contribute to the expense of GAO's freight bill audit.

Department of Defense and GSA generally require headquarters' approval of all tenders or quotations before acceptance, but it is difficult to determine how many quotations have been filed, by whom, or on what traffic. Moreover, there are large areas of Government operation not under DOD or GSA control.

Tenders are given generally to individual departments or agencies, and it is therefore possible that separate and different quotations on identical commodities between the same points are given different branches of the Government.

There is evidence that section 22 quotations applying to large and regular movements produce higher charges than might normally be expected to result from open negotiation with carriers' rate committees or from appeal to the Interstate Commerce Commission. If Government rate negotiations were conducted openly and parallel to those of industry, at small cost the Government could avail itself of assistance from industrial traffic establishments having an interest in movement of the same or similar products.

Effect on Commerce Generally

One of the primary aims of Congress in passing the Interstate Commerce Act in 1887 was to place all shippers and receivers of freight on a fair, reasonable, and nondiscriminatory basis, and to enable every shipper to ascertain his rate and the rates of his competitors.

[fol. 1226] Instances have come to light where some branches of the Government seek bids from suppliers on a dual basis, i. e., f. o. b. origin and f. o. b. destination, and at the same time ask carriers to make special rates under section 22 from one or more possible origins. When suppliers cannot determine from published tariffs the rates which will be applied on their goods, they are unable to make an intelligent or competitive bid because the factor of transportation cost is a secret of the Government.

To the extent that some Government rates are kept secret, such practice contradicts the congressional mandate that all carriers must operate openly—giving deliberate publicity to their actions—when considering rates for commercial shippers[2] and that when rates are agreed upon they must be given publicity in advance of their effectiveness.[3]

Practices which create rate wars among commercial suppliers of transportation are not in the public interest. The auctioning of traffic by some Government agencies is contrary to the concept of a regulated transportation industry required by law to make rates which are determined, by recognized standards, to be just and reasonable. To the extent the abuse of section 22 encourages destructive competitive practices, and to the extent Government traffic moves at rates lower than a reasonable level, a burden is placed on other traffic.

Possible Remedies

Many believe that something should be done to correct the inequities involved in the present system, but there is incomplete agreement as to what should be done. The Interstate Commerce Commission is currently considering requiring advance filing of section 22 quotations, but there is doubt the Commission has authority to deal with the subject. If it has no such authority, then there is an administrative gap with respect to a substantial portion of

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[2] Sec. 5 (a), Interstate Commerce Act and Commission orders issued pursuant thereto.

[3] Sec. 6, Interstate Commerce Act.

the Nation's freight traffic, and the present undesirable situation would have to be corrected by action of Congress. Some carriers favor legislation which would make filing of section 22 quotations subject to jurisdiction of the ICC. Others, including the motor common carriers of property, insist the best solution is repeal of the provision which authorizes movement of Government traffic at other than normal published rates.

The Need for Special Government Rates

Some contend that it is neither practicable nor equitable to require the movement of Government traffic at commercial rates, or to require Government agencies to nego- [fol. 1227] tiate rates under the same conditions as commercial shippers.

Some Government traffic moves under conditions which do not correspond with those in industry generally. Government movements are frequently counter in direction to commercial movements precluding the use of the normal pattern of commodity rates. Frequently movements of Government traffic develop so rapidly that it is impossible to get rates established before the shipments begin to move. Without section 22, some agencies feel they would experience extreme difficulty in securing retroactive application of negotiated rates. Industry only infrequently obtains retroactive adjustment of rates and then only through proceedings before the Interstate Commerce Commission to secure reparation. Government agencies generally feel they should be exempt from supplying the detailed information required in such proceedings; because of procurement policies there is little doubt the need for retroactive application of rates on Government traffic would be much greater than on commercial traffic.

Carrier opposition to the elimination of section 22 is voiced principally by the railroads and arises largely with respect to freight because of the requirements of the long-and-short-haul provisions of the fourth section of the Interstate Commerce Act[4] and the fear of being unable to move

[4] The fourth section forbids, as to rail transportation, the charging of higher rates to an intermediate point than to a farther dis-

quickly to meet the competition of contract motor carriers. With respect to passenger movements their opposition relates to the use of section 22 as a bidding device to meet contract offerings of contract air and highway competition.

Contract motor carriers are not required to file with the Commission the actual rates which they charge, but only minimum rates below which they may not go. Part 45 air carriers are not required even to file minimum rates with the CAB. Thus, contract carriers have considerable latitude in determining what rates they will charge on Government traffic. The railroads fear their competitive position will be materially worsened if they are required to file rates with the Commission and if similar requirements are not enforced against other carriers. Conversely, contract carriers contend that so long as common carriers are relieved from filing Government rates, they should be exempt from filing even their minimum rates.

[fol. 1228] THE AUDIT OF FREIGHT BILLS

One of the important functions of traffic management is the audit of bills for freight charges.

Industry realizes some corollary benefits from its freight bill audit by detecting legal but unreasonable rates on continuing movements, failures to load to required minimum weight, failures to take advantage of opportunities for consolidating shipments, and other uneconomical practices on its part.

Very few Government civilian agencies make any attempt to preaudit freight bills. Among the exceptions are AEC and TVA. TVA makes such a thorough audit prior to payment that no final audit is considered necessary; in the last 6 months of 1953 the audit reduced TVA's freight bill $58,000—approximately the cost of its entire traffic department. In the Defense Establishment only the Marine Corps attempts to preaudit its freight bills.

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tant point over the same line or route. The Interstate Commerce Commission may, in special cases, grant relief from this section subject to conditions set forth in the section. Motor carriers are not subject to similar restrictions.

The final audit of transportation charges for all departments of the Government is carried out in the General Accounting Office. It is designed and employed solely for the collection of overcharges. Some 1,400 employees are involved. The work is 2 years behind. Present legislation provides that transportation bills will be paid promptly as rendered, subject to adjustment downward if the final audit so indicates. The General Accounting Office does not adjust undercharges.

There are conditions which make the audit of Government freight bills somewhat more complicated than the audit of bills covering commercial traffic, but by the same token there are differences which point the way to a simpler, more effective, and less expensive means of audit.

It must be recognized that an audit of freight bills which are often more than 2 years old involves checking not only tariffs in effect at the time the shipment moved but also the section 22 quotations which were then outstanding. As we point out elsewhere, these quotations run into the thousands and change literally from day to day.

On the other hand, the Government is not, like private industry, required to pay its freight bills within a specified time.[1] By taking advantage—within the bounds of reason—of a limited time in which initially to pay freight charges, a complete audit could be made in one operation. This would provide the benefits of a preaudit for each traffic [fol. 1229] management organization without maintaining the extensive final audit section in GAO. It would also correct the undesirable situation of having literally millions of dollars outstanding in overcharges on which the carriers pay no interest. Too, it would conform to the position expressed by the President in his veto message on S. 906 (83d Cong., Finality of Government Contracts), wherein he said the Government should be subject to the same statute of limitations as applies on commercial traffic.

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[1] Interstate Commerce Commission regulations permit extension of credit for commercial freight charges not exceeding 96 hours on carload freight and 120 hours on less than carload freight.

[fol. 1230] TRAFFIC MANAGEMENT—DEPARTMENT OF DEFENSE

Freight and passenger traffic management in the Department of Defense is important and complex simply by reason of the volume of traffic involved.

Freight Traffic

VOLUME AND NATURE

The tabulation below shows the tonnage moved within the continental United States by each of the four services and the freight charges paid for fiscal year 1954, these statistics not only being the latest available but presumably are representative as a base for the immediate future:

Department	Tons	Freight Charges
Army	13,088,300	$384,355,500
Air Force	8,522,608	131,194,256
Navy	4,602,339	106,233,787
Marine Corps	571,387	19,428,640
Total	26,784,634	641,212,183

Maintenance of buildings and equipment and subsistence activities of the four military services require transportation of a substantial proportion of all the various articles which move in commercial channels. Construction activities of the Army Engineers and Navy Construction Battalion require movement of most types of building materials. Additionally, Department of Defense is responsible for the transportation of weapons, ammunition, and other equipment and supplies peculiar to the military services.

A more detailed statement of the Army's transportation requirements available for fiscal year 1953 shows the magnitude of the traffic management problem. On the average, the Army originated *every day* 3,406 shipments, of which 900 were carload, 640 were truckload and the remainder LTL or LCL. The average daily freight charges were $1.12 million.

Exhibit A further depicts the volume of Army traffic involved.

[fol. 1231] DEVELOPMENT OF PRESENT TRAFFIC MANAGEMENT ORGANIZATION

Public Law 152, 81st Congress, which vested in General Services Administration jurisdiction over the traffic activities of the various departments of the Government, provided that the Secretary of Defense might, unless the President should otherwise direct, exempt the National Military Establishment from the requirements of the law as to transportation and traffic management, whenever he might determine such exemption to be in the best interest of national security. Following the passage of that law, the President on July 1, 1949, issued a memorandum addressed to the Director of the Bureau of the Budget, the Secretary of Defense and the Administrator of General Services Administration, directing them to undertake and diligently pursue studies aimed at developing areas of understanding with respect to the extent to which the National Military Establishment should be exempt from the jurisdiction of GSA as to traffic matters.

On October 5, 1950, an "areas of understanding" agreement was executed, but it did not settle the differences between the military establishment and GSA. Extensive cooperation was not attained between these departments, and on June 8, 1954, the President issued a memorandum canceling the action of July 1, 1949. This left to the Secretary of Defense determination of the extent to which he would exempt from the control of GSA, the traffic activities of the Military Establishment. Thereupon a directive completely exempting Department of Defense traffic from GSA control was issued by the Secretary of Defense on October 2, 1954, stating that the Department will continue to cooperate with GSA on matters of mutual interest.

The exemption of the traffic of the Department of Defense from control of GSA appears to be a necessary move, for the traffic of the military establishment is so great and the problems so complex that as a practical matter GSA can afford little assistance or control.

In the meantime, on August 23, 1950, there was established by directive of the Secretary of Defense, a unified traffic service for DOD known as the Military Traffic Service. The directive stated the purpose to be:

> To provide under one authority efficient and economical traffic management for the movement within the continental United States of persons and things for all agencies or departments of the Department of Defense, subject to the policies of the Joint Chiefs of Staff and the Munitions Board."

The functions of the service were outlined as follows:

> The functions of the MTS are the customary activities of traffic management. They pertain to the transportation of persons and things for all agencies and departments of the Department of Defense. They are generally of staff and functional rather than operating nature. The major functions relate to such matters as recommending modes of carriage, prescribing routes, negotiating rates, and such analysis of carriers' vouchers before payment as may be considered necessary to accomplish the purposes of MTS.

[fol. 1232] The directive further provided for the appointment of a civilan director to report directly to the Secretary of Defense. He was given broad powers over the traffic management policies of the Department, but apparently was not given authority to bring about consolidation of the traffic functions of different segments of the Department.

In April 1953 the Office of Director of Transportation was established within Department of Defense. This interim measure continued the Military Traffic Service, but eliminated the Office of Transportation in the Munitions Board, the functions of which were brought under this new office. International transportation matters were likewise placed under this new office.

Effective June 30, 1953, the Department of Defense was reorganized and by directive of August 13, 1953, responsibility for traffic and transportation management was placed under the Assistant Secretary for Supply and Logistics, a newly created position. The Office of Director of Transportation thus became subordinate to an Assistant Secretary of Defense, who has various other duties and responsibilities.

The Office of Director of Transportation, as such, was abolished November 1, 1953, and in lieu thereof there was created the Office of Director of Transportation and Communications. This new office was given all of the responsibilities of the former Office of Director of Transportation, plus responsibilities with regard to communications, utilities, and fuel (other than fuel oil).

The establishment of the Military Traffic Service in August 1950, with the Director reporting directly to the Secretary of Defense (a status equal to an Assistant Secretary), gave definite recognition to the importance of traffic management in the Military Establishment. However, through the chain of events just recited, that concept of traffic management has been downgraded to the point where the Director of Transportation and Communications is merely another member of the staff of an Assistant Secretary.

It is questionable if the Office of Director of Transportation and Communication has the status to provide essential control demanded of military traffic management. Exhibit B shows in chart form the present traffic management organization of the Department of Defense.

PERFORMANCE OF TRAFFIC FUNCTIONS BY PRESENT ORGANIZATION

Aside from the influence exercised by the Department of Defense Director of Transportation and Communications, the traffic of the Department of Defense is subject to four sources of control—the Army, the Navy, the Marine Corps, and the Air Force. Although there is a limited amount of coordination among these services, in the main each controls its own traffic activities. The Army performs a part of [fol. 1233] the traffic work for the Air Force, but the Air Force is planning to take over all of this work with the possible exception of the movement of shipments to ports for transportation to overseas destinations. The Navy and Marine Corps do not delegate similar authority to the Army.

The number of personnel and the annual payroll assigned to freight traffic management by each of the services for the calendar year 1953 is set forth below:

	Number of personnel	Annual payroll
Army	2,087	$8,315,531
Navy	1,910	6,971,153
Marine Corps	245	887,059
Air Force[1]	1,460	5,126,625
Total	5,702	21,300,368

[1] See Air Force table, p. 44.

Army.—Under the present organizational arrangement, each of the branches of the Department of Defense maintains separate field offices which have varying degrees of authority over the movement of traffic. Army traffic management headquarters is in Washington, D. C. There are four principal field traffic offices (Memphis, Tenn., Pittsburgh, Pa., St. Louis, Mo., and Salt Lake City, Utah) and several subordinate offices. In addition each Army area, of which there are seven, maintains separate traffic organizations. The following table separates by various offices the total personnel and annual payroll assigned to freight traffic management by the Army:

	Number of personnel	Annual payroll
OCOFT	281	$1,308,184
Zone transportation offices	250	1,215,113
Con US ports	150	572,692
Army areas and MDW	1,384	5,105,307
Technical forces	22	114,235
Total	2,087	8,315,531

It will be observed that freight traffic personnel under the direct control of the Chief of Transportation number 681, maintained at a cost of $3,095,989, whereas the personnel assigned to freight traffic functions in the seven Army areas, including the Military District of Washington, number 1,384, maintained at an annual cost of $5,105,307.

The amount spent on traffic activities in the seven Army areas seemed to demand a more detailed study by the Committee. Therefore, further information was developed on the Second Army Area.

The annual payroll for those engaged in freight traffic activities was $1,502,715. This included not only personnel [fol. 1234] located in the control office at Fort Meade, Md., but also at 56 additional points within the area where it was considered necessary to perform traffic functions. Although figures were not available from which the costs could be computed, when rental, travel allowances, and other expenses are added, the total cost would be very much in excess of the figures set forth above. Under presently effective regulations the financial control of the Second Army extends not only to moneys spent for the maintenance of forces engaged in traffic work for the Second Army but also for those performing traffic work for the technical services. This is in process of change, and if and when the change is effected, the various Army areas will be relieved of all responsibility for financing and controlling the traffic functions of the technical services. The control office at Fort Meade keeps close check not only on moneys spent, but also on the efficiency and effectiveness of the traffic work performed at the 56 locations under its supervision. As presently organized, the amounts spent in traffic activities in the seven Army areas offer opportunities for substantial savings through reorganization.

Navy.—Traffic management in the Navy is subject to general supervision of the Chief of Bureau of Supplies and Accounts, and is directly supervised by the Assistant Chief for Transportation.

The table below sets forth the personnel and annual payroll assigned to various freight-traffic activities.

Group	Number of personnel	Annual payroll
Office, Assistant Chief for Transportation (BuSandA)	186	$924,085
Central freight control offices	130	574,827
Field offices—traffic and transportation	1,587	5,433,322
Navy purchasing offices	3	12,482
Joint Land Transportation Agency	4	26,437
Total	1,910	6,971,153

The force assigned to Office of Assistant Chief for Transportation, including the Central Freight Control Offices, located at Bayonne, N. J., Norfolk, Va., Great Lakes, Ill., Oakland, Calif., and Seattle, Wash., roughly corresponds functionwise with that of the Chief of Transportation of the Army. It will be observed that the largest item of cost is in the maintenance of 147 field traffic offices.

At several points more than one traffic office is maintained; Philadelphia, for example, has five assigned to different branches of the naval service. A material reduction in the cost of maintaining traffic service for the Navy, without impairing its effectiveness, is practicable.

Marine Corps.—The Marine Corps, with a volume of traffic comparable to that handled at one average-size industrial plant, maintains a large full-dress traffic organization. The table below shows the total personnel and annual [fol. 1235] payroll assigned to various freight traffic activities:

	Personnel	Salaries assignable to traffic management
Washington headquarters	33	$165,418
Field activities	212	721,641
Total	245	887,059

In addition to this organization the Marine Corps has recently established a San Francisco Freight Control Office, which at full strength will involve eight employees and a $40,000 payroll.

Air Force.—Traffic management in the Air Force is subject to general supervision of the Director of Transportation.

The following table sets forth the personnel and annual payroll assigned to various freight traffic activities:

Air Force Command	Number of personnel	Annual payroll
Air Defense Command	208	$544,761.58
Air Materiel Command	417	1,749,441.00
Air Proving Ground Command[1]	1	6,423.00
Air Research and Development Command	14	58,148.00
Air Training Command[2]	317	1,077,757.83
Air University[2]	6	27,469.18
Continental Air Command[2]	43	185,021.52
Headquarters Command	30	186,778.26
Military Air Transport Service[2]	12	65,477.69
Strategic Air Command[2]	337	917,928.07
Tactical Air Command[2]	75	307,418.72
Total	1,460	5,126,624.85

[1] The Air Proving Ground Command has 2 people engaged in traffic management whose combined annual salaries are $10,705. Air Force people estimated 60 percent of their time is devoted to freight activities.

[2] Based on an actual division of personnel and payroll between freight and passenger activities supplied by the Air Force (for Air Defense Command, Air Materiel Command, Air Proving Ground Command, Air Research and Development Command, and Headquarters Command), above figures represent 83 percent of overall personnel and 82 percent of overall payroll.

The Air Force is in the process of drastically revising its system of handling traffic matters. At present it has a loosely knit organization; much of its traffic is routed at individual field stations and most of its rate adjustment work is done by the Army. Under the plans now being put into effect, there will be four field traffic offices located at Middletown, Pa., Oklahoma City, Okla., San Bernardino, Calif., and Warner Robins, Ga. It is planned to have 3 commissioned officers and 30 civilian employees at each of these offices. In addition there will be a number of subtraffic offices located at New York, Chicago, Dallas, and certain other places not yet fully decided upon. The Air Force feels its volume of traffic has grown to such size it should assume full responsibility with the possible exception of portbound traffic, which it plans to let the Army control.

Exhibit C summarizes the results of study of the individual services.

[fol. 1236] INEFFICIENCY OF PRESENT ORGANIZATION

For fiscal year 1954, the cost of traffic management staffs represented for the Army 2.2 percent, for the Navy 6.6 percent, for the Air Force 3.9 percent, and for the Marine Corps 4.6 percent of the amount paid for transportation. In the judgment of the Committee, and its industrial advisers, the manpower handling traffic management for the military services is excessive. In salaries alone, it approximates $20 million a year. If operating costs such as those accruing for rent, travel, communications, and equipment were added, this sum might well be doubled. The plans now underway in the Air Force to take over complete handling of its traffic affairs will no doubt increase the present aggregate costs materially.

Much of this unnecessary expense results from duplication of facilities and services. In several localities, two or more of the military services operate field traffic offices; in some places such offices are maintained by all four services.

Not only are these duplicated efforts wasteful but they inevitably produce conflicts in policies and practices which confuse carriers and tend to lower the quality of transportation service furnished.

The lack of coordination between the various services in their traffic and procurement activities, which is inherent in the present system, is productive of expensive crosshauling. Numerous instances of the purchase of unnecessary transportation have been brought to the attention of the Committee. If the traffic activities of the services were properly coordinated, unnecessary crosshauling and other wasteful practices would be revealed in the normal course of activities.

[fol. 1237] TRAFFIC MANAGEMENT FOR THE CIVILIAN DEPARTMENTS AND AGENCIES

General Situation and History

A study of traffic functions in the civilian agencies reveals a heterogeneous assortment of policies and practices. There is an almost complete lack of uniformity and consistency in the handling of Government traffic.

All of the earlier reports discussed in the preamble emphasized the necessity for strong central traffic management. The first Hoover Commission report dealt with the subject at length. Congress provided legislation to implement a central traffic service, but GSA did not assume its responsibility and opportunity, nor did Congress appropriate sufficient funds to make it a workable reality.

The Federal Property and Administrative Service Act of 1949 (Public Law 152, 81st Cong.) provides in section 201 (a), that the Administator of the General Services Administration—

> * * * *shall*, in respect of executive agencies, and to the extent that *he* determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned * * * prescribe policies and methods of procurement and supply * * * including related functions such as * * * storage, classification, transportation and traffic management * * *; and operate (and) take over * * * with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies * * *

These provisions of the act were intended to implement the Hoover Commission recommendations for strong centralized traffic management in the Government.

The program was doomed to failure before it ever got underway. In fairness, it must be recognized GSA rather suddenly assumed responsibility for purchasing and managing vast quantities of Government supplies and property. In the overall picture traffic management was conspicuous because of its apparent complexity and diversity of handling. Efforts to effectuate central traffic management were further frustrated by provisions of the act exempting, or partially exempting, certain departments and agencies. In any event the program was not pursued with conviction or wholehearted enthusiasm.

[fol. 1238] On September 16, 1949, the Administrator of GSA conferred with 25 representatives of various governmental departments and agencies then having some traffic management responsibilities. He stated in his opening remarks that it is *not* GSA's purpose to build a *central* traffic bureau, "but only one sufficiently large to be of utmost service."

It is apparent from reviewing the minutes of the conference that the Administrator and those participating in the discussion with him had no concept of centralized control of Government traffic by GSA and the adoption of uniform and consistent traffic policies and practices.

A proposed plan for a Federal Traffic Agency was distributed and discussed. Immediate objections to centralized authority came from several present. (For example, the Bureau of Reclamation insisted it should retain its own traffic organization which it contended was responsive to its particular needs.) The Administrator stated that GSA could not justify the "establishment and maintenance of an organization that would service principally one operation of the Government." He said agencies having much traffic volume should maintain their own traffic organizations and that the GSA Traffic Division should be a coordinating agency, gathering and keeping up-to-date information for the use of the civilian agencies. In other words, as he stated it, GSA Traffic should act as the official Government repository of information, advice and decisions covering controversies between a traffic branch and a carrier.

Little progress was made at that meeting—or subsequent to it—toward the adoption of uniform Government traffic policies.

Diametrically opposite views were expressed on proposed routing policies intended to insure "equitable distribution" of traffic. Some of the representatives said that if carriers were assured a fair share of traffic, it would be difficult to negotiate rates with them. Others contended fair treatment generated more cooperation from carriers.

The principle under discussion was never resolved.

Maintenance of duplicate tariff files was discussed. (Tariffs themselves are expensive and keeping up a sizeable tariff file is no small job.) Some questioned whether a

centralized tariff file could take care of the needs of the various agencies of the Government during a national emergency.

Although it was explained the plan for centralized files was intended for normal peacetime conditions and any plan necessarily carried with it provision for expanded operation in emergencies, no decision was made and there has been little elimination of duplicating tariff files.

The net result of this irresolute approach is that any agency which wants to manage its own traffic is permitted to do so, and the plan for a central traffic *management* agency empowered to control traffic and to enforce standard [fol. 1239] and consistent policies and practices has not materialized.

Instead of creating one centralized, coordinated traffic organization to supplant the numerous independent Government traffic offices with their duplicated efforts and conflicting policies, GSA superimposed upon the already confused situation still another traffic agency with still another set of policies and practices.

GSA Traffic Management

GSA Traffic Management Division's services are "available" to other departments if they wish to use them, but there is no compulsion to do so. Although a large number of civilian agencies did call upon GSA Traffic for some kind of service during fiscal year 1954, our study and research discloses little uniformity of traffic practices and policies among these agencies. Some departments are theoretically governed by GSA prescribed traffic policies,[1] but in practice each department does what it pleases.

The Committee surveyed those agencies and departments responsible for moving sizable volumes of freight, and in the course of these contacts, and in responses to questionnaires, there developed a pattern of dissimilarity in practices and policies which supports our conclusions that the objectives of the prior Hoover Commission have not been attained. (See exhibit G.)

[1] G. S. 554, Freight Traffic Management, June 1952.

These surveys developed in considerable detail the volume and nature of each agency's traffic, its methods for handling traffic, and its relations with GSA Traffic Division. Exhibit E summarizes the most important facts developed about each of the principal agencies.

The Position of Traffic Management in GSA

GSA Traffic Management Division is a branch of the Federal Supply Service concerned primarily with procurement activities. As illustrated by the organization chart reproduced as exhibit F, the Traffic Management Division has been subordinated to procurement rather than coordinated with it.

Unless Traffic Management has a status equal to and independent of Procurement, as recommended by the prior Hoover Commission, it cannot function effectively to control transportation.

Emergency Procurement Service

Although GSA's Traffic Management Division is centered in the Federal Supply Service, and Emergency Procure- [fol. 1240] ment Service is likewise a part of GSA, Emergency Procurement has its own large traffic organization not controlled by the GSA general traffic department. Indeed, there is ample evidence of lack of coordination between the two—and in instances, lack of businesslike cooperation on traffic matters. Paradoxically, EPS, with its limited area of responsibility, has a larger traffic organization than the GSA Traffic Management Division, which is available to more than 100 Government departments and branches.

For a recent period about 8 percent of Emergency Procurement tonnage consisted of rubber, fibers, and vegetable oils on which movement Emergency Procurement was responsible for all traffic management functions. For other commodities, consisting chiefly of metals and minerals, traffic management is limited to responsibility to the port of entry. Domestic rates and routing are handled by the Traffic Management Division of GSA.

EPS is responsible for traffic incidental to foreign-aid operations. It applies to FSS Traffic Department for rates

and routing to the ports, but arranges its own ocean transportation.

The traffic function being performed in EPS is essentially the same as that performed by GSA Traffic Management Division; it is especially similar to the work of the regional offices of the GSA Traffic Management Division.

It has been argued that since the traffic work carried on by EPS is "operational and functional," it is not suitable for inclusion in the activities or responsibilities of GSA Traffic Management Division. Yet, these functions are similar to—in fact identical with—many of those performed by Traffic Management Division regional offices. All functions said to be peculiar to EPS are normally performed by industrial traffic departments. They include preparation of shipping instructions and bills of lading, maintaining transit records, checking demurrage and storage charges, arranging customs clearances; development of rate information for the evaluation of bids, etc.

There is no valid reason why GSA Traffic Management Division cannot assume the traffic responsibilities performed by EPS; not only would this eliminate duplication of facilities and effort, but it is likely GSA traffic could effect important savings in transportation costs. As this report is being written, the Committee is pleased to note that GSA is taking action to accomplish this.

Traffic Manuals

GSA Traffic Management Division has issued a manual covering freight traffic management procedures and policies. Similar manuals have also been issued by other offices, including:

[fol. 1241] Atomic Energy Commission.
Bureau of Reclamation.
Civil Aeronautics Administration.
United States Coast Guard.
Forest Service.
Maritime Administration.
Tennessee Valley Authority.
Veterans' Administration.

The Veterans' Administration manual is a well-arranged publication containing a comprehensive classification of commodities showing correct descriptions for billing purposes. The other manuals, however, are largely repetitious of material contained in the GSA manual.

The sole purpose of a traffic manual is to foster uniform practices and procedures among various branches of an organization. Many industrial traffic departments issue manuals for this purpose. Seldom, if ever, does an industrial concern publish different manuals for each plant or branch office.

For the same reasons there should be only one Federal civilian traffic management manual. If there are special conditions existing in a particular agency or service, the general manual can take care of them by suitable exceptions. The GSA Traffic Manual could be rearranged, and some of the requirements, particularly those involving records and reporting forms, substantially simplified and improved. Much time and work can be saved if reports and records are streamlined.

Tariff Files

Although as originally contemplated, GSA Traffic Management Division was to maintain the facilities and provide services for all Government agencies (except those specifically exempted), there are numerous offices in Washington and elsewhere maintaining large files of tariffs in which transportation rates are published.

The Bureau of Reclamation has an active file of 1,437 tariffs including 524 issued by Railway Express Agency, Inc. It also keeps about 3,000 canceled tariffs which it claims are necessary to determine rates on past shipments. Concurrently GSA is maintaining in Denver, adjacent to the Bureau of Reclamation Traffic Office, active files of the same tariffs; and GAO, as the official freight billing auditing agency of the Government, is maintaining a complete file of canceled tariffs.

The Veterans' Administration, although it consults GSA about rate negotiation matters, maintains a file of some 2,000 tariffs in Washington. These duplicate the publications maintained by GSA.

[fol. 1242] The Maritime Administration, with only two people and but little traffic, has 2,200 tariffs.

Although tariffs are generally supplied to the Government without charge, they are nevertheless an expense to the carriers which ultimately is reflected in freight charges. Of more immediate importance is the fact that the maintenance of huge tariff files is an expensive function. Most tariffs are supplemented frequently—some, more than 100 times a year—and each time the tariff must be located in the file and revisions made either by insertion of individual pages or exchange of new supplements for canceled ones.

One of the minor, but nonetheless significant opportunities for saving through implementation of GSA traffic service, is the elimination of many unnecessary and duplicative tariff files.

Routing and rate quotations for smaller agencies can be handled by suitable routing guides and centrally established billing procedures.

[fol. 1243] CONCLUSIONS AND RECOMMENDATIONS

Traffic Management, Department of Defense

CONCLUSIONS

1. The magnitude of military transportation requirements, freight and passenger, dictate that its traffic management should be performed independently of traffic management functions of civilian agencies.

2. There is opportunity to effect substantial savings in traffic management costs through consolidation and coordination of military traffic facilities and functions without impairing the effectiveness of military traffic management nor the responsiveness of essential transportation to military control.

3. Effective control of traffic functions in the several military services is not now being accomplished by the Transportation Office of the Department of Defense, nor is there uniform understanding and appreciation of the importance of such supervision and control being accomplished.

So long as each service is permitted to handle its own traffic activities without strict overall civilian control applied directly from the Department of Defense itself, there will be little progress made in reducing operating costs or improving transportation utilization and control. The transportation activity of the Military Establishment is extensive and costly. The movement of passengers, including the service provided for military dependents, is in itself a major undertaking in terms of scope and expenditure. The problems of freight movements are more numerous than those of any single industrial enterprise. It is imperative that it all be efficiently managed and operated.

The problems of management and administration can be identified and solved satisfactorily, with attractive savings, if accepted principles of organization, administration, and control are more aggressively applied to the military transportation function in the Department of Defense. Staff arrangements and division of work within the services are not uniform. Except in the Army, where transportation is the responsibility of a single corps, the transportation function is not consistently recognized on a basis matching its importance and cost. The appointment of key transportation officers is determined at the service level, and it is significant that, generally speaking, the staffs at the various levels within the services appear to have been set up locally to meet peak-load requirements, with limited means of sys- [fol. 1244] tematic analysis for the control of manpower and thus costs in relation to workload.

The Committee has observed that the present transportation organization, both within the Transportation Office of the Department of Defense and at the service level, is deficient in the accumulation and use of adequate and necessary statistical information for transportation management purposes. Many statistics are reported in connection with transportation expenditures. They were not found to be coordinated or consolidated to provide comparative totals for administrative use, nor were they uniform. The opportunity for improved statistical methods and standards obtains. It seems axiomatic that the Department of Defense is no different from any large industry from the standpoint of the importance to its successful management of accumu-

lating accurate and well-designed cost, rate and statistical data, with appropriate officers responsible for its intelligent analysis and use for the attainment of improved efficiency and control of expenses.

4. Closer integration of procurement, transportation planning, and traffic management offer control to accomplish substantial savings in freight transportation expense through avoiding crosshauling, minimizing length of haul, greater use of available transit arrangements, and consolidation of shipments.

5. The encouragement of cross-servicing arrangements, particularly with respect to the use of warehouse facilities offers, where practicable, opportunities for transportation economies.

6. In the field of passenger transportation, there is greater lack of uniformity of control, all the way from the administrative level within the services down to the transportation officer at posts, camps, and stations, than is true with respect to freight traffic management. Policy understanding at the local level is not satisfactory and, as between the services, it is not uniform.

7. The Committee has not studied the effect of, nor does it draw conclusions with respect to, the continuation of communication responsibilities in the top administrative office for transportation in the Department of Defense.

8. In summary, it is concluded that the organization of the Defense transportation function needs a "new look" in the form of strengthened central direction because of:

(*a*) Lack of recognition of transportation's key importance.

(*b*) Lack of coordination among and within the services.

(*c*) Present organization plan which subordinates transportation.

(*d*) Lack of review and improvement of operating performance.

(*e*) Wide and unsupervised diffusion of technical functions.

(*f*) The existence of too complete subservience to military control.

(*g*) Supervision by inadequately trained officers.

(*h*) The lack of adequate statistical and management control data.

(*i*) The absence of adequate salaries for traffic management personnel.

[fol. 1245] Taken together, there is at the secretarial level insufficient concern with existing transportation administration problems and resulting excessive costs presently involved in the decentralized management and conduct of the transportation function throughout the Department of Defense.

RECOMMENDATIONS

The Committee recommends that the management of traffic and transportation in the Department of Defense be administered by a position at the Assistant Secretary level. His office should have no responsibilities and duties except those pertaining to traffic and transportation. He should have all necessary authority to direct the traffic management activities, passenger and freight, in all the military services, including the coordination and consolidation of functions and facilities, to the extent that his office determines it to be necessary and practicable. The position should report to and be subject only to the overriding authority of the Secretary of Defense. In addition to his responsibility for the minimizing of duplication and the development of organizational combinations, and coordination, his duties should include, but not be limited to—

1. The making, issuance, and policing of Department of Defense policy directives relating to transportation.

2. Effecting a working liaison with procurement and distribution personnel at both the administrative and service levels.

3. Supervising the placement and training of key civilian traffic management personnel in Washington and at field installations of the armed services.

4. Controlling the usage policywise of military manufactured commercial-type transportation.

5. Making continuing studies of transportation management functions performed by the services with a view to eliminating wasteful practice, duplication, lack of uniform standards of practice, etc.

6. Removing promptly from the military services and establishing within his own organization the following traffic management functions:

(*a*) The handling of all rate negotiations and classification matters.

(*b*) Prescribing routing policy to be observed by all the services.

(*c*) Prescribing policy to be followed in the distribution of passenger and freight traffic among carriers.

(*d*) Representing the Department of Defense in proceedings before regulatory bodies.

(*e*) Representing the Department of Defense in proceedings before carrier associations or conferences.

[fol. 1246] 7. Establishing a statistical bureau—

(*a*) Sufficient to provide information necessary for the proper evaluation of rates applicable to Department of Defense traffic; and

(*b*) Sufficient to provide reasonable management data to integrate transportation requirements and procurement.

Traffic Management for the Civilian Departments and Agencies

CONCLUSIONS

The plan of the prior Hoover Commission for strong centralized traffic management for Government agencies has not been implemented.

The failure to make centralized traffic service a workable reality is attributable to the exemptions which were pro-

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NOTE.—The position Traffic Management should occupy in the GSA organization is outlined in broken lines in exhibit F.

vided in Public Law 152; to the failure of GSA to approach the problem in an aggressive, resolute manner; to the budgetary and civil-service limitations which prevented the assembly of a staff adequate in number and ability; to the subordinate position accorded traffic management in the organizational structure of GSA; and to the reluctance of individual agencies and departments to relinquish any of their prerogatives or personnel.

The continued maintenance of individual traffic departments within the various civilian agencies of the Government is resulting in substantial unnecessary payroll costs, in use of unnecessary office space (the numerous tariff files alone occupy significant space), in a confusion of traffic practices and policies, and in the failure to recognize and take advantage of opportunities for substantial savings in transportation expenditures.

The transportation functions of the Department of Defense are so vast and so different from those of the civilian agencies that they should be handled separately.

RECOMMENDATIONS

The Committee recommends that—

1. There be established in GSA a Central Traffic Management Division, adequately staffed and with sufficient authority to exercise effective control and management over all traffic and transportation policies, practices, and activities within the civilian branches of the Federal Government.

[fol. 1247] 2. Public Law 152 be amended to eliminate therefrom the exemptions of any civilian agencies from the supervision and control of GSA Central Traffic Management, but positively to exempt the Department of Defense from GSA Traffic Management control.

National Transportation Policy

CONCLUSIONS

In the performance of their traffic management functions, Government agencies and departments either fail to appreciate properly, or deliberately ignore, national trans-

portation policy. Their failure to give effect to this declaration of Congress is jeopardizing the economic stability of our transportation system.

One of the most damaging manifestations of Government failure to observe national transportation policy is the abuse of the provisions of section 22 of the Interstate Commerce Act, permitting reduced rates on Government traffic.

There is need for a definitive expression of the transportation policy to be observed by those responsible for management of Government traffic.

Appearance of numerous Government agencies before the Interstate Commercie Commission as advocates of the public interest not only results in unwarranted expense but constitutes to the extent not authorized by Congress a breach of national transportation policy and is contrary to the fundamental principles of fair play by the Government.

RECOMMENDATIONS

The Committee recommends that—

1. The national transportation policy should be amended to make it clearly applicable to the Government in its capacity as a user of transportation as well as in its capacity of a regulator of transportation.

2. All statutory provisions authorizing or requiring Government agencies or departments to appear before the Interstate Commerce Commission as representatives of the public or segments of the public should be repealed.

3. The regulatory agencies of Government dealing with transportation should be authorized to call upon DOD and GSA for factual information to assist it in the performance of its functions.

4. A joint resolution should be enacted by the Congress authorizing and directing that distribution of Government traffic, as between the several forms of transportation, and [fol. 1248] as between individual carriers, shall be made on a basis which in the judgment of the responsible traffic management office is fair, equitable and in furtherance of the national transportation policy.

Government Traffic Personnel

CONCLUSIONS

The Committee concludes—

1. There is an excessive number of employees performing traffic management functions. A contributing factor is the quality of the personnel. Little improvement can be expected in this area so long as Civil Service Commission Classification Standards prohibit the payment of salaries competitive with those paid by carriers and industry.

2. Present rotational policies with respect to military officers adversely affect traffic management within the Defense Department.

RECOMMENDATIONS

The Committee recommends that—

1. Congress direct the Civil Service Commission to undertake a revision of Classification Standards for the Traffic Management Series to the end that salaries may be made competitive with those paid by private industry, and the Government thus enabled to employ competent personnel.

2. The Department of Defense carefully examine the rotation policy of the individual services from the standpoint of effect upon traffic management.

Special Government Rates

CONCLUSIONS

While it is true that Government traffic differs in quantity and nature from commercial traffic, the Committee is not impressed with the necessity for continuing special Government rate quotations. The urgent need for correcting abuses which are becoming increasingly prevalent outweighs hardships on governmental agencies or on carriers which could arise from making Government traffic subject to regulations which apply to commercial traffic. The Government is entitled to the same just and reasonable rates as are commercial shippers, and can obtain such

rates by open negotiation with established carrier agencies and, if necessary, from the Interstate Commerce Commission. The fact that some Government traffic moves in differ- [fol. 1249] ent directions, or to different destinations than commercial traffic, in no way precludes establishment of fair rates.

Elsewhere in this report the Committee recommends closer coordination between procurement activities and traffic functions. Effectuation of these recommendations should enable the Government to negotiate rates sufficiently in advance of most movements to obviate the necessity for retroactive application. However, to provide for instances where advance negotiation is not possible, the Interstate Commerce Act could be amended to allow retroactive application of rates on Government traffic when authorized by the Interstate Commerce Commission and without the detailed showing required in reparation cases. Likewise, the Commission could establish rules to meet security requirements in connection with movement of Government property.

Indeed, the fourth-section argument is not impressive because on traffic peculiar to the Government there is no reason why fourth-section relief should be sought and granted; and on traffic which moves in commercial channels there is no reason why rates should be any lower for the Government than for commercial shippers.

In order that common carriers would not be put at a disadvantage, the motor contract carriers should be required to file actual rates on Government traffic and the so-called part 45 air carriers should be made subject to rate regulation on Government traffic.

RECOMMENDATIONS

The Committee recommends that—

1. Section 22 of the Interstate Commerce Act be amended by eliminating the provisions which authorize the movement of Government passengers and property at free or reduced rates.

2. Section 6 of the Interstate Commerce Act should be amended, if necessary, to permit retroactive application of

rates on Government traffic when the Interstate Commerce Commission so authorizes.

3. Section 218 of the Interstate Commerce Act should be amended to require contract motor carriers to file actual rates or charges on Government traffic with the Commission.

4. The Civil Aeronautics Act should be amended to place all carriers handling Government traffic for hire under rate regulation and subject to requirements for filing and observing tariffs.

5. The Interstate Commerce Commission should, when necessary, make proper rules and regulations pertaining to movement of classified Government property.

6. The recommended amendment to section 22 should become effective upon approval of the legislation, except that provision should be made permitting section 22 quotations outstanding at the effective date of the amended act to remain in force for not more than 2 years.

[fol. 1230] *Audit of Freight Bills*

CONCLUSIONS

It is the Committee's conclusion that neither the military nor the civilian agencies are receiving the benefits inherent in a proper audit of freight bills. The present system is ineffective and too expensive. The auditing functions for the civilian agences should be performed by the central traffic management organization, and the Department of defense should audit bills of all military agencies.

RECOMMENDATIONS

The Committee recommends that—

1. The Department of Defense should institute an auditing section for transportation billing for all the military services, combining preaudit and final audit into one operation, so organized that carrier charges will be paid in not more than 30 days.

2. General Services Administration should create an auditing section responsible for performing combined preaudit and postaudit functions for all civilian agencies of Government, charges to be paid in not more than 30 days.

3. Both the auditing sections recommended should be so designed in their technical procedures as to give traffic management all of the information which it can beneficially use.

4. The General Accounting Office can carry out its responsibilities by making test checks and conducting analyses of procedures sufficient to insure adequacy of the audits.

5. Section 16 (*e*) of the Interstate Commerce Act should be amended specifically making Government traffic subject to the statute of limitations.

6. Section 322 of the Government Traffic Act (49 U. S. C., sec. 66) should be amended to permit implementation of the above recommendations.

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[fol. 1251] ANALYSIS OF MILITARY DEPARTMENTS

Department of the Army

The Chief of Transportation heads the Transportation Corps. He is the chief transportation officer of the Army, and the Traffic Manager for the Department of the Army. He is concerned with the movement of personnel as individuals or units and the shipment of freight. He serves as technical staff adviser to the Secretary of the Army, the Chief of Staff, and all elements of the Army on matters pertaining to traffic management. The Chief of Transportation, together with the chiefs of the other six Technical Services, reports directly to the Assistant Chief of Staff, G-4.

Within the Department of the Army, the Assistant Chief of Staff, G-4, is charged with the overall supervision of logistics. In the traffic management field he implements this through the Chief of Transportation. The Chief of Transportation carries out his responsibility through a headquarters organization, 4 Transportation Zone Offices

in the field, and 7 Transportation Officers on the staffs of the Continental United States Army Commanders.

To accomplish his mission as Traffic Manager for the Department of the Army, the Chief of Transportation receives his primary support from a "traffic platoon" which is under the Assistant Chief of Transportation (Traffic).

ASSISTANT CHIEF OF TRANSPORTATION (TRAFFIC)

The Assistant Chief of Transportation (Traffic), with the assistance of two Deputy Assistant Chiefs, directs the "traffic platoon" consisting of four traffic divisions: Movement Control, Freight Traffic, Traffic Services, and Passenger Traffic. The "traffic platoon" exercises jurisdiction over all traffic requirements of the Army and certain similar functions for the Air Force. It is assisted in the discharge of its responsibilities by four field agencies designated as Transportation Zone Offices, located at Pittsburgh, Pa., Memphis, Tenn., St. Louis, Mo., and Salt Lake City, Utah. These four Transportation Zone Offices were established during the latter part of 1952. They were established to serve as field activities of the Chief of Transportation to perform certain decentralized traffic management functions on a territorial basis. The territorial boundaries of each Transportation Zone Office generally conform with the ratemaking territories.

[fol. 125] Only those traffic management functions which are nationwide in scope and which require close coordination with other agencies located in the District of Columbia have been retained in Washington.

CONTINENTAL UNITED STATES ARMY TRANSPORTATION OFFICES

An Army Transportation Officer is on the staff of each of the six Army Commanders and the Commanding General, Military District of Washington. Commanders of the ConUS Armies and the MDW also have certain responsibilities for traffic management within their respective areas of jurisdiction. These include the responsibility for arrangements for commercial transportation of Army personnel, supplies, and equipment at class II installations and activities. Excluded from the Army commanders' juris-

diction are contractor-operated service stations, ports of embarkation, and such other Transportation Corps installations and activities which perform transportation functions that are national in scope. The traffic management responsibilities of the ConUS Army Transportation Offices at Class II installations and activities encompass technical supervision over the activities of installation transportation officers to a major degree.

INSTALLATION TRANSPORTATION OFFICES

The Installation Transportation Officer arranges for the commercial transportation of Army personnel, supplies, and equipment. He serves on the staff of the installation commander and is his adviser on all transportation matters. He is considered to be a most important cog in the traffic management setup of the Department of the Army since he is close to the freight and passenger traffic.

TRANSPORTATION CONSULTANTS

A recent determination has been made by the Chief of Transportation that a technically qualified Transportation Corps Officer will be assigned to the Chiefs of the Technical Services to serve as Transportation Consultants. With the assignment of these officers, future procurement and distribution decisions will be made will full consideration of the traffic management implications. Thus traffic management guidance will be injected in a field that has not heretofore been available to the Chief of Transportation and will enable him more fully to perform his function of Traffic Manager of the Army.

RATE NEGOTIATION (FREIGHT)

The Adjustment and Classification Branch of the Freight Traffic Division is charged with the responsibility for ad- [fol. 1253] justment of freight rates and classification ratings. This responsibility covers freight moving by commercial means for the Army and, for the present, for the Air Force. (The Air Force will shortly take over its own rate-negotiation activities.)

During the calendar year 1953 the Department of the Army handled 298 negotiations with the carriers, of which 273 were successfully completed. The Army estimates that for the same period the savings through rate adjustments were in excess of $9 million.

ROUTING

Routing Control.—All port releases are issued in the Office of Assistant Chief of Transportation, Washington, D.C. Shipments of 10,000 pounds or more, destined to a port, are rigidly controlled by the Port Traffic Branch. To the extent possible, in the selection of the port to be used the one which will result in the lowest landed cost for shipments to oversea destinations is selected.

The Transportation Zone Offices are responsible for the routing of shipments of 10,000 pounds or more going to domestic destinations; for arranging for shipments of small lots of ammunition and explosives where exclusive use of truck, or express movement is necessary; for approving express movements of 500 pounds or more, and for air movements of 500 to 5,000 pounds.

There are approximately 130 class II installations (such as warehouses, depots, arsenals of the technical services, training camps, etc.). Each of these has a local transportation officer. He is authorized to ship and route shipments up to 10,000 pounds. On shipments over 10,000 pounds for domestic movement, he requests routing from the Zone Office; if for overseas destination, he requests routing from the Office of Assistant Chief of Transportation, Washington, D. C.

DIVISION OF TRAFFIC AMONG CARRIERS

So far as is possible, when rates are equal, freight traffic for land transportation is divided 50 percent to truck carriers and 50 percent to rail carriers. When rates are different, the carrier having the lowest rate will be used provided that carrier can give the required service.

For rail transportation the country has been divided into regions, and each carrier within a defined region is assigned,

so far as is possible, a quota which reflects its proportion of mileage to the total mileage of the region.

Distribution among truck carriers is based upon their ability to carry, and their past record of carriage.

[fol. 1254] Monthly reports are received from the field offices showing the tonnage given to each carrier (truck or rail). These reports are checked in the Office of Assistant Chief of Transportation, and in the Zone Offices, to determine which carriers are plus and which are minus, according to the quotas which have been established, and as nearly as possible to do so an equalization is made.

ARMY-OWNED RAIL EQUIPMENT

The total number of Army-owned cars registered for interchange service is as follows:

Type	Number
Tank cars	3,818
Flatcars	905
Total	4,723

Tank cars are used for the transportation of chemicals and fuel.

The flats are of the heavy-duty type and are used to handle heavy machinery, tanks, etc., for which commercial carrier equipment is not readily available.

The Army owns a few boxcars, but these are used almost exclusively in intraplant service.

All Army-owned equipment is controlled in the Transportation Zone Office at St. Louis, Mo. All car records, mileage records, etc., are kept in that office.

Department of the Navy

The Chief of Bureau of Supplies and Accounts is responsible for control of Transportation and Traffic Management in the Department of the Navy.

The functions of Transportation and Traffic Management are administered by the Office of Assistant Chief for Transportation, Washington, D. C., and augmented in the field by five Navy Central Freight Control Offices located at: Bayonne, N. J.; Norfolk, Va.; Great Lakes, Ill.; Oakland,

Calif.; and Seattle, Wash. In addition there are approximately 1,000 field installations and activities to which have been delegated, and may exercise, traffic management to a limited extent.

OFFICE OF ASSISTANT CHIEF FOR TRANSPORTATION

Within the Office of Assistant Chief for Transportation are the following divisions: Air Traffic Division, Freight Rate and Classification Division, Surface Traffic Division, Cargo and Terminal Operations Division, Requirements and Statistics Division, and Household Goods Division.

[fol. 1255] NAVY CENTRAL FREIGHT CONTROL OFFICES

The Navy Central Control Office directs the means of transportation to be used for all freight originating in the assigned areas to the end that Navy property will be transported in the most economical manner, considering the urgency of delivery and the necessity of making the most effective use possible of transportation facilities. However, shipments originating in certain designated areas for movement via Fleet Logistic Air Wings will be routed on instructions obtained from the supply officer who has been assigned to issue such routings for the particular area.

RATE NEGOTIATION (FREIGHT)

All rate negotiations and classification adjustments are handled in the Office of Assistant Chief for Transportation.

Sources of possible rate adjustments are: requests for routing, shipping orders, review of carrier dockets, IBM studies, and information received from the five Navy Central Freight Control Offices.

An analysis of the various possibilities is made by the Rate Adjustment Branch. If this Branch feels an adjustment should be sought, facts are prepared and a recommendation is made to a five-man rate review committee. If the suggested proposal is approved by a majority of that committee, the proposal is forwarded simultaneously to all interested carriers through the Chairman of Carrier Traffic. During the calendar year 1953 the Department of the Navy handled 158 rate negotiations with the carriers,

of which 104 were successfully completed. During the same period 16 negotiations were handled with the Classification Committees, of which 13 were successfully completed.

ROUTING

Routing Control.—In general, the routing of the following types of shipments is controlled by the Office of Assistant Chief for Transportation:

1. All shipments of ammunition and explosives moving by express, and all shipments weighing 10,000 pounds or more moving by all other modes of transportation.
2. All tank-car shipments.
3. All shipments of 1 million pounds and over (except lumber and subsistence).
4. All domestic air shipments of 150 pounds or more and exceeding 44 by 24 by 20 inches in dimension.
5. All international air shipments.

[fol. 1256] Local installations (such as shipyards and naval air stations) may route independently—

1. All shipments of less than 10,000 pounds when moving by rail, truck, or inland waterways.
2. All shipments of 200 pounds or less by express (except ammunition and explosives).
3. All shipments of less than 150 pounds by air to domestic destinations.

Routing of all shipments not within the Washington headquarters or local installation control is controlled by the Navy Central Freight Control Offices.

DIVISION OF TRAFFIC AMONG CARRIERS

A qualified experienced man receives all requests for surface routing, analyzes them, and passes them on to the rail, motor, or water section as his judgment indicates. About 90 percent of routing requests are initially referred

to the right section in this way. Routing clerks in the rail, motor, and water sections are required to check rates and routes, and to interchange requests if rate comparisons indicate this action to be proper. Based on transportation cost comparisons, material is routed in the most economical manner consistent with service requirements.

If rates and service of different carriers within a mode are equal, traffic is equitably apportioned to the extent possible among competing carriers. If rates are equal but service is different—and service is of paramount importance on a specific movement—routing is prescribed via the carrier, or carriers, furnishing the service which will meet military needs.

NAVY-OWNED RAILROAD EQUIPMENT

The total number of Navy-owned cars registered for interchange service is as follows:

Type and Number	
Tank cars	318
Boxcars	2,185
Flatcars	77
Total	2,580

The stated reason for Navy ownership of "rolling stock" is to provide a pool of transportation equipment readily available to meet military demands. Many of the cars are special-type equipment necessary to meet Navy requirements, such as flatcars especially rigged to handle 3-inch and 5-inch guns, and boxcars with DF loaders for the hauling of ammunition and explosives.

[fol. 1257] To obtain maximum utilization of Navy-owned equipment, and to avoid charges for excess empty miles, centralized control is exercised by the Surface Traffic Division of the Office of Assistant Chief for Transportation. The assignment, routing, and all other instructions relative to the use of these cars emanate from Washington, D. C.

Department of the Air Force

The Director of Transportation is responsible for the transportation and traffic management activities in the Air Force. He reports to the Deputy Chief of Staff (Materiel).

Headquarters, Air Materiel Command, is located at Dayton, Ohio. Within this command there is the Transportation and Packaging Division, Directorate, Supply and Services, which performs traffic management functions.

There are eight air materiel areas located in the field: Sacramento, Calif., San Bernardino, Calif., Ogden, Utah, San Antonio, Tex., Oklahoma City, Okla., Mobile, Ala., Warner Robbins, Ga., and Middletown, Pa. There is a transportation officer, with personnel, at each of these areas. Additionally, there are a number of air commands located throughout the United States which have transportation officers with personnel.

In addition, by about January 1955, the Air Force will have established four transportation zone offices: Middletown, Pa., Oklahoma City, Okla., San Bernardino, Calif., and Warner Robbins, Ga. These zone offices will have essentially the same functions as the zone offices of the Army, already established.

Subject to policies promulgated, and authorities delegated, by the Director of Transportation (Washington, D. C.), the Air Materiel Command serves as the "traffic management office" of the Air Force.

RATE NEGOTIATION (FREIGHT)

At present, rate negotiation activities for the Air Force are performed by the Army, Office of Chief of Transportation. However, the Air Force soon will take over, and perform for themselves, their own rate negotiation activities, thus relieving the Army, Office of Chief of Transportation, of those duties.

At present, all Air Force movements of 10 carloads or truckloads or more are reported to Army Chief of Transportation with a copy to the Director of Transportation (Air Force). These reports are used by OCT to determine the necessity for rate adjustment. They are used by the Office of Director of Transportation (Air Force) to follow up with OCT to make sure that proper consideration is given in the rate adjustment area.

[fol. 1258] ROUTING

The Director of Transportation, Washington, D. C., issues all policies to govern the routing of Air Force shipments. The Director has delegated to Air Materiel Command, Dayton, Ohio, authority to monitor these policies with all Air Force commands. Headquarters, Air Materiel Command, Dayton, Ohio, routes 85 percent of Air Force traffic; the remaining 15 percent is routed by the other major air commands.

All Air Force portbound traffic is routed by Army Chief of Transportation.

Each Air Force Base submits to Headquarters, Air Materiel Command, Dayton, Ohio, a weekly freight routing report, with an information copy to the chief transportation officer of the major command. These reports are screened by Air Materiel Command, and instances where the policies prescribed by the Director of Transportation have not been complied with, are called to the attention of the transportation officer of the command involved.

Each Air Force activity submits a monthly report to his headquarters command showing outbound and inbound tonnages and estimated transportation costs. Each headquarters command consolidates the reports of the transportation officers reporting to that command and forwards the consolidated report to the Director of Transportation, Washington, D. C. These monthly reports are used for statistical purposes.

AIR FORCE-OWNED EQUIPMENT

The Air Force owns 18 heavy-duty flatcars. However, it is expected that shortly these cars will be turned over to the Department of the Army.

The Air Force uses Army-owned tank cars for the transportation of fuel and also a portion of Army-owned flatcars. The routing of Army-owned cars used by the Air Force is controlled by the Air Materiel Command, Dayton, Ohio.

United States Marine Corps

The quartermaster General, USMC, is responsible for the transportation and traffic management activities in the Marine Corps.

There are 13 major Marine Corps field activities. There s just recently been established a Central Freight Con-ol Office at San Francisco, Calif. However, it is expected at little, if any, increase in expense will result from the tablishment of this office as the total manpower and costs volved, for the operation of Marine Corps Forwarding ol. 1259] Annex, San Francisco, will be divided between e two establishments.

TE NEGOTIATION (FREIGHT)

All rate negotiation activities of the Marine Corps are ndled in the Office of the Quartermaster General, Wash-gton, D. C.

Generally, rates applicable to movements weighing less an 100,000 pounds are not analyzed for possible rate ad-stment. On movements, 100,000 pounds and over rates e analyzed, and if an adjustment is deemed necessary, a oposal is filed with the carrier associations, or with car-rs direct, if there is no association.

During the year 1953, the Marine Corps filed 35 pro-sals, of which 29 were successfully completed and 6 were ll pending.

UTING

The Office of the Quartermaster General issues all policies govern the routing of Marine Corps shipments.

Ammunition and explosives are routed by the Office of e Quatermaster General.

The field activities have authority to route shipments ighing less than 10,000 pounds. The Central Freight ntrol Office at San Francisco, Calif., has been given thority to route shipments weighing 10,000 pounds and er within the territory west of the Mississippi River; e Office of the Quartermaster General will route ship-nts weighing 10,000 pounds and over within the territory st of the Mississippi River, and interterritorially.

ISION OF TRAFFIC AMONG CARRIERS

When rates are the same, so far as is possible, traffic is vided equally among the carriers. However, if rates are

not the same, the traffic is given to the carrier having the lowest rate, provided it can give the service required.

MARINE CORPS-OWNED RAIL EQUIPMENT

Such railroad equipment as is owned by the Marine Corps is used only in intraplant movements.

[fol. 1261] DEFENDANT'S EXHIBIT E

REVISION OF FEDERAL TRANSPORTATION POLICY

A REPORT TO THE PRESIDENT

Prepared by the

PRESIDENTIAL ADVISORY COMMITTEE

on

TRANSPORT POLICY AND ORGANIZATION

April 1955

[fol. 1263] LETTER OF TRANSMITTAL

MY DEAR MR. PRESIDENT: On July 12, 1954, you established under my chairmanship a Presidential Advisory Committee on Transport Policy and Organization. You requested that we undertake a comprehensive review of overall Federal transportation policies and problems and submit our recommendations for your consideration.

In the preparation of our report, I have had the full cooperation of all members of your Committee. To assist us in our review of government transportation policies, I appointed a Working Group composed of outstanding individuals who have long had a close understanding of the Nation's transportation problems. Mr. Arthur W. Page, a Director of the American Telephone and Telegraph Com-

pany, New York City, served as Director of the Working Group.

I wish to commend each member of the Working Group for his contribution. Your Committee's unanimous report and recommendations are in large measure based on the study made by the Working Group.

After examination of the Nation's transportation problems, your Committee determined to focus its primary attention on those Federal policies which appeared to be most urgently in need of revision if the transportation industry of the United States is to maintain itself at maximum effectiveness.

In examining the effectiveness and deficiencies of the domestic transportation system, it was clearly evident that two broad major areas of Federal policy required prompt revision. In brief, the principal emphasis of our report is that, in conformity with today's availability of a number of alternate forms of transport, Federal policies should be amended (1) to permit greater reliance on competitive forces in transportation pricing and (2) to assure the maintenance of a modernized and financially strong system of common carrier transportation adequate for the needs of an expanding and dynamic economy and the national security.

Our report does not propose any change in existing regulatory authority over the entrance of new enterprises in the field of public transportation, nor does it propose any change in the Federal organization for the administration of transportation functions and responsibilities.

Respectfully yours.

SINCLAIR WEEKS, *Chairman.*

THE PRESIDENT,
THE WHITE HOUSE.

[fol.1264] PRESIDENTIAL ADVISORY COMMITTEE ON TRANSPORT POLICY AND ORGANIZATION

Members:

Sinclair Weeks, Secretary of Commerce, Chairman
Charles E. Wilson, Secretary of Defense
Arthur S. Flemming, Director, Office of Defense Mobilization

Ad Hoc Participating Members:

George M. Humphrey, Secretary of the Treasury
Arthur E. Summerfield, Postmaster General
Ezra Taft Benson, Secretary of Agriculture
Rowland R. Hughes, Director, Bureau of the Budget

[fol. 1265] III. SPECIAL GOVERNMENTAL RATES

In addition to the basic issues of transportation policy discussed above, the special problem of government rates merits attention.

Recommendation: Continue authority for carriers to establish voluntary special government rates but subject such rates to all provisions of the Act (including public filing) except suspension and long-and-short haul provisions, with authorization for application of special government rates retroactively and on short notice in special instances and with authorization for waiver of filing requirements in cases where national security is involved.

The use by carriers of that portion of Section 22 of the Interstate Commerce Act granting free or reduced rate [fol. 1266] transportation to government traffic has given rise to abuses and evils which are not in the public interest. It is recognized also however that government procurement practices and the peculiar exigencies affecting movement of its traffic as distinguished from normal movement in commercial channels require special consideration.

For these reasons existing statutory provisions authorizing carriers to tender special government rates and fares to

the United States, State, and Municipal Governments should be amended in such a way as to preserve the features which accommodate the special needs of government traffic movements yet will overcome the present abuses.

Except for rates and fares subject to security, such special government rates and fares should be published in tariffs and filed in accordance with the provisions of the Interstate Commerce Act and regulations thereunder, provided that filing and publication requirements of the Interstate Commerce Commission may be waived to assure application of such rates or fares on less than statutory notice or retroactively.

Upon enactment of legislation to accomplish the above recommendations, a savings clause should be inserted to permit carriers sufficient time to review and incorporate then existing provisions of Section 22 tenders in published tariff form.

[fol. 1267] DEFENDANT'S EXHIBIT "F"

December 22, 1955

The Honorable J. Percy Priest
Chairman, Committee on Interstate and
Foreign Commerce
House of Representatives
Washington 25, D. C.

Dear Chairman Priest:

Your letter of May 11, 1955, requesting comments on a bill, H.R. 6141, introduced by you (by request), "To amend the Interstate Commerce Act, as amended so as to provide for a stronger national transportation industry, and for other purposes", has been given careful consideration by the Commission and I am authorized to submit the following comments:

H.R. 6141, introduced May 10, 1955, would implement various recommendations made in the Report of the Presi-

dent's Advisory Committee on Transport Policy and Organization." Before discussing the bill it appears desirable to comment on some of the general features of that report.

On page 5 of the report in the draft released at the White House, April 18, 1955, four "major objectives" are listed as follows:

> [fol. 1268] 1. Increased reliance on competitive forces of transportation in rate making * * *;
>
> 2. Maintenance of a modernized and financially strong system of common carrier transportation;
>
> 3. Encouragement of increased efficiency and economy in the management of all transportation services in order to give the ultimate consumer the benefit of the lowest possible transportation costs; and
>
> 4. Development of an efficient transportation system for defense mobilization or war.

Nos. 3 and 4 above listed require no comment. There is no possibility of disagreement as to their desirability.

The report indicates that the Advisory Committee considered the second objective to be of paramount importance, as it stated on page 3 of the report:

> The public interest requires the maintenance of a sound and vigorous common carrier transportation service by all of the available means of transport, each operating within its respective capabilities and developing in accordance with the indicated demand for its services.

With this objective we are completely in accord. Therefore, we are in favor of the recommendations of the Advisory Committee with respect to redefinition of private and contract carriers by motor vehicle (with suggested modifications), bulk commodity exemptions, freight forwarder associations, and intrastate "service deficits." At the same [fol. 1269] time we believe that the Advisory Committee might well have favorably considered certain other measures clearly needed for improving the position of common carriers to which we have called the attention of the Con-

gress in our annual reports of the past several years. These include the repeal of the Federal transportation taxes and adequate control of trip-leasing practices. Another subject of much importance in the same connection is that of agricultural-commodity exemptions, mentioned only briefly in the report with an indefinite recommendation that "the Act should be clarified to indicate what exemptions the Congress now wishes to give without undue interference with the main purposes of the legislation."

The Advisory Committee's first-listed major objective, "increased reliance on competitive forces of transportation in rate making * * *" requires more extensive comment. Under the heading "Obsolete Regulation" the Committee expresses the view that "in many respects, government policy at present prevents, or severely limits, the realization of the most economical use of our transportation plant." In the introduction to the report it states that "the underlying concept of this regulation has continued to be based on the historic assumption that transportation is monopolistic, despite the fact that the power [fol. 1270] of individual transportation enterprises to exercise monopoly control has been rapidly eliminated by the growth of pervasive competition." These statements, we submit, are based on a misconception of the true situation.

Prior to the advent of the motor carrier, regulation was in large measure controlled by both monopolistic conditions and excessive competition. With the phenomenal development of highway transportation by for-hire carriers and by proprietary haulers, the emphasis has shifted largely, but not exclusively, from intra-agency to inter-agency competition.

When transportation was dominated by railroads the practice of charging many times as much "for a ton of diamonds as for a ton of coal," to use a classic example, even though there was little difference in the cost of performing the service, had universal approval. Under today's conditions strict adherence to such a practice in carrier competitive situations would be wholly unrealistic. High grade traffic, if charged substantially more than the cost of the service is readily diverted to other and unregulated forms of transportation. As a result, the regulated carriers

who continued to adhere to the former practice of rate making would be left with little more than the traffic which others found undesirable to handle. In the face of these [fol. 1271] economic realities, the task of rate making has changed. Greater emphasis must now be placed upon cost and competitive considerations. This does not mean that competition should be permitted to run riot or that all existing principles of rate making should be made to give way to an inflexible statute requiring a fixed and rigid course of action. It means rather that there should be an orderly transition from a justifiable past practice to one that recognizes and gives effect to the exigencies of the present. We are satisfied that a careful analysis of recent action of this Commission will show abundant evidence of the recognition of the changes in the competitive transportation picture and of the fact that with few exceptions these changes may be given adequate consideration under present laws.

The history of transportation regulation in the United States shows clearly that unregulated or inadequately regulated competition may be quite as much of a public evil as unregulated monopoly. Full understanding of this fact on the part of the Congress is shown by the evolution of the Interstate Commerce Act.

Before the original enactment of the Act in 1887 the Cullom Senate Committee, the predecessor of the present Senate Committee on Interstate and Foreign Commerce was concerned with "indiscriminate and cut-throat compe- [fol. 1272] tition of the carriers." As stated by an outstanding writer in this field, William Z. Ripley in his "Railroads—Rates and Regulation" (p. 449) "Competition had run mad." The most important amendments to the Act from 1887 to the present time have been in the nature of restraints on that competition.

Early declarations of Congressional policy regarding the restraints of competition were in substance repeated in the more comprehensive statement of National Transportation Policy which now serves as a preface to the Interstate Commerce Act. This statement was formulated only 15 years ago at the time of the last comprehensive revision of the Act when water carriers were subjected to broader regulation thereunder.

In the present statement of policy the Congress has directed that the Act be so administered as "to encourage the establishment and maintenance of reasonable charges for transportation services without * * * unfair or destructive competitive practices." The Advisory Committee apparently deems the removal of this last admonition necessary in order to achieve the maximum effect of "increased reliance on competitive forces of transportation in rate making."

We do not quarrel with the view that competition in transportation under present day conditions should be given adequate play. However, we caution against too [fol. 1273] great a removal of restraints. Resort to the laws of the jungle with competition in full play will not produce the desired transportation system. This is recognized on page 8 of the Advisory Committee report in the statement: "There is, however, danger that unrestrained rate competition may result in undue depression of rate levels." Complaints against reductions in rates on the claim that they unnecessarily dissipate carrier revenue frequently arise. Those complaints are by railroads against railroads and motor carriers against motor carriers. They ask protection by the Commission against such disruptive practices. If the law were amended as suggested by the Advisory Committee this source of redress would be unavailable.

It seems appropriate to emphasize what we have already suggested, that in the main the indicated objectives of the Advisory Committee may be effectuated within the framework of the present statutes. The dominant effect of the proposed legislation would be to permit all rates to gravitate to the bare compensatory level. In administering the present Act this Commission has encouraged healthy competition between different transport agencies and between competing carriers in the same agency. At present one of the duties of the Commission is to determine the reason- [fol. 1274] ableness of rates. What are reasonable rates is not delineated in the present Act, but is left to be determined by certain standards and guideposts provided by the Congress. The avowed purpose of Congress was to foster sound conditions in transportation required in the

public interest. What the report proposes and the bill would require is that the duty to establish reasonable rates be maintained, but that the Commission be left without power to restrain excesses. We seriously question the prudence of this proposal.

As a preliminary to the preparation of this report we submitted the proposed legislation to each Bureau of the Commission for thorough examination, so that we might have the benefit of their comments and criticisms on the matters with which each is particularly concerned. To a considerable extent the views thus elicited are reflected in the discussion of individual sections of the bill appended to this letter.

Respectfully submitted,

J. M. JOHNSON
J. M. Johnson
Acting Chairman

Att.

[fol. 1275] (5) At present section 22 of the Act provides that "nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments . . . or the transportation of persons for the United States Government free or at reduced rates . . ." It is now proposed to delete the underlined words from section 22 and to add a new paragraph to section 15a so as to authorize rates, etc. "of special application for transportation service" to these governments. Such rates would, however, become subject to most of the other provisions of the Act except that for security reasons filing, posting, and publication of tariff schedules and contracts could be waived.

In recent years there has been much dissatisfaction with the exemptions accorded to Government shipments by section 22. In our opinion that dissatisfaction is justified, and we are therefore in favor of amending this section. We urge, however, that any special rates for the governments should be limited to apply only during time of war, or

threatened war, or other national emergency, and that such rates be negotiated on a firm and unassailable basis. We believe that a thorough study by Congress as to the present-day needs respecting the furnishing of transportation free, or at reduced rates, is warranted.

We do not believe that this matter should be included in section 15a, which has always been fundamentally a rule of rate making for the guidance of the Commission rather than the carriers. It would be preferable, we believe, to add any new provision as a paragraph of the present section 22 or attach it to section 6. If the Advisory Committee's proposed amendment is to be adopted, we suggest the following wording, which would remove some duplication and lack of clarity in the proposed draft:

> The establishment, maintenance, publication, and application of rates, fares, charges, and rules and regulations of special application for transportation service to the United States, State, and municipal governments by carriers subject to this Act is hereby authorized. Such rates, fares, charges, and rules and regulations may be made retroactive where the circumstances so warrant, and shall not be subject to suspension or to the provisions of section 4, but shall be subject to all other applicable provisions of the Act: *Provided, however,* that the provisions of the Act with respect to filing, publication, and posting of tariff schedules and contracts may be waived where the security of the United States so requires upon the filing of an appropriate statement in writing with the Com- [fol. 1276] mission by the head of the Government agency concerned. Transportation services rendered by common carriers subject to the Act for such governments other than under rates, fares, charges, and rules and regulations of special application shall be subject to all the provisions of the Act.

* * * * * * *

[fol. 1277] DEFENDANT'S EXHIBIT "G"

(EMBLEM)

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

October 19, 1954

B-102080
Mr. P. M. Shoemaker, Chairman
Committee on Transportation
Commission on Organization of the
Executive Branch of the Government
441 G Street, N. W.
Washington 25, D. C.

Dear Mr. Shoemaker:

Reference is made to your letter of September 9, 1954, concerning the statement of the national transportation policy, as contained in the Interstate Commerce Act, and the discussion of that policy which appears in a letter from this Office to the Administrator of General Services, dated April 13, 1951, B-102080, and in Senate Report No. 2034, on the Supplemental Appropriation Bill, 1955, H. R. 9936, 83d Congress, 2d Session. After calling attention to these matters, you request the opinion of this Office on two specific questions, with an explanation of the reasons why the indicated position is taken by this Office, if such questions are answered in the affirmative. Those questions are:

"1. Do traffic managers for the Federal government have responsibilities under the national transportation policy which require that they carry out their duties in a manner different from the manner in which they would act if the national transportation policy did not exist?

"2. Is the following a reasonable interpretation of Acting Comptroller General Yates' position?:

"'Enforcement of the national transportation policy is not the function of traffic managers of the federal government.'"

These questions, in the form stated, seem necessarily to presuppose that traffic managers for the Government are charged with some duty to enforce the national transporta- [fol. 1278] tion policy so declared. However, no explicit statutory provision imposing such a duty upon them has been found and the consideration given the question of enforcing the policy in decided court cases seems rather to support the view that it was intended to guide the operation of regulatory bodies, such as the Interstate Commerce Commission, in their efforts so to regulate carriers as to result in the establishment of an adequate and efficient transportation system, fair to all types of regulated surface carriers and to the general public as well. In this connection, the Transportation Act of 1940, 54 Stat. 898, 899, which enacted the national transportation policy in amending the Interstate Commerce Act, declared it to be the policy of the Congress "* * * to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act * * *" and enumerated specific objectives, in substance, as follows:

1. To recognize and preserve the inherent advantages of each mode of transportation.

2. To promote safe, adequate, economical, and efficient service.

3. To foster sound economic conditions in transportation and among the several carriers.

4. To encourage the establishment and maintenance of reasonable charges, without unjust discriminations, undue preferences or unfair or destructive competitive practices.

5. To cooperate with duly authorized state officials.

6. To encourage fair wages and equitable working conditions in the transportation industry.

The closing sentence of the national transportation policy, as enacted, reading "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy," indicates that the stated

policy is an integral part of each of the ensuing subdivisions, or parts, of the act and must be read as if written separately into each of the several parts.

The role of the national transportation policy in connection with determinations made by the Interstate Commerce Commission, has been the subject of comment in *Interstate Commerce Commission* v. *Inland Waterways Corporation*, [fol. 1279] 319 U. S. 671, especially the dissenting opinion of Mr. Justice Black at pages 697-703; *McLean Trucking Company* v. *United States*, 321 U. S. 67; *Eastern Central Motor Carrier Association* v. *United States*, 321 U. S. 194, and *United States* v. *Pennsylvania Railroad Company*, 323 U. S. 612, all of which discuss the policy in more or less general terms and in relation to its impact upon the actions of the Interstate Commerce Commission in connection with its regulatory functions and duties. No mention is made in any of these cases of the effect of the stated policy on the actions of members of the other administrative branches of the Government in their dealings with carriers, and while it does not appear that any action or operation of officials of other administrative branches of the Government were involved in those cases, they do not appear to afford any expression of obligation upon shippers generally in that connection which would serve as a guide or direction to Government officials in the discharge of their duties as traffic managers.

When other departments or agencies of the Federal Government deal with the carriers, they represent the Government usually as a shipper or user of transportation services, and their relationship to the carriers is comparable to the relationship of other shippers or users of such services to such carriers. A commercial shipper, upon locating or establishing a new plant or facility to manufacture or process a product, becomes concerned with the problem of ascertaining whether satisfactory rates are available via carriers by rail, motor, water, or otherwise, both on the raw materials inbound to, and the manufactured products outbound from, the new plant, and in undertaking to procure the establishment of such rates, if they are not available. To this end negotiations may be undertaken with the carriers involved and if they are completed

satisfactorily, the carriers ordinarily will initiate the necessary action to establish the proper rates by filing tariffs with the Interstate Commerce Commission, such tariff rates to become effective on statutory or other notice, subject to suspension or rejection for due cause by the Interstate Commerce Commission or other controlling regulatory body. Obviously the same process is available when a department or agency of the Federal Government initiates a new program authorized by the Congress, with the exception that if the negotiated rates are less than established tariff rates they may be made available in the form of "Section 22" tenders or quotations, rather than in the regularly published tariffs to be filed with the Interstate Commerce Commission.

As pointed out in the letter from this Office dated April 13, 1951, B-102080, to the General Services Administrator, it is difficult to understand how a Government traffic manager, engaged primarily in the procurement of transportation services, properly can give effect, in his day-to-day dealings with the carriers, to the provisions of the national transportation policy which require for their implementation consideration of such variable factors as the reason- [fol. 1280] ableness of charges, the maintenance of sound economic relations in transportation and among the carriers, the prevention of unjust discrimination and destructive competitive practices—all as they may be affected by the particular transportation services which it is the function of the traffic manager to procure. The traffic manager ordinarily does not have readily available the vast amount of data concerning the financial structure of the carriers, their costs of operations, the value of their plant and equipment, the extent of their operations, their current earning position, and many other matters that seem pertinent to the proper enforcement of the national transportation policy. What might seem to one traffic manager or to one set of traffic managers as contributing to "sound economic conditions in transportation" or as constituting "unjust discrimination" or "destructive competitive practices" might seem to another traffic manager or another set of traffic managers as constituting neither an unjust discrimination, nor a destructive competitive practice, nor as con-

tributing to unsound economic conditions in transportation. The question as to what constitutes an unjust discrimination or a destructive competitive practice must be determined in the light of the pertinent surrounding facts in particular situations. In order that the prime objectives of the Interstate Commerce Act against unjust discrimination, unreasonableness, etc., may be attained uniformally in its administration, the courts generally have required that such matters, constituting administrative questions, be considered as primarily within the jurisdiction of the Interstate Commerce Commission for determination, in the light of the particular facts and circumstances involved. It is believed to be expecting too much to assume that traffic managers for the Government, operating in the widely unrelated fields in which the various departments of the Government have need for transportation services, peculiar to their individual requirements, would attain anything less than chaos in the acceptance or rejection of rate tenders, if the traffic managers are supposed to give effect to their individual ideas of what the national transportation policy requires in relation to the particular services, which it is their function or duty to procure.

The discussion of the national transportation policy contained in Senate Report No. 2034 on the Supplemental Appropriation Bill, 1955, has been carefully noted and considered. The question of Government appearances in connection with rate increase proposals was discussed in testimony before the Senate Committee on Appropriations by Mr. Edmund F. Mansure, Administrator of the General Services Administration, during hearings on H.R. 9936. Mr. Mansure was questioned by the Committee with respect to the appearance of personnel of the General Services Administration before the Interstate Commerce Commission and other regulatory bodies in opposition to general rate increases sought by the carriers or utilities, and was asked to explain the authority for such activities. Mr. Mansure replied that such appearances were authorized and [fol. 1281] required by the provisions of paragraph (4), section 201 (a) of the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, and he was granted permission by the Committee to furnish

subsequently a more complete explanation of such activities by the personnel of his agency. See, in this connection, pages 945 to 949 of the Report of Hearings before the Senate Committee on Appropriations on the Supplemental Appropriation Bill, 1955, H.R. 9936. In the material thus furnished, it was explained that since the Government is one of the largest—if not the largest—single user of transportation and utilities services, it was deemed right and proper that it be represented at proceedings before the regulatory bodies during the consideration of requests for general increases in rates and charges, so that it could furnish a proper evaluation of the effect of such general increases upon its costs in connection with future procurement programs. In other words, the Government as a shipper or user of the service should have "its day in court" along with other shippers and users, and where proposed increases were considered excessive it did not seem improper for the Government to oppose the granting of the general increases sought by the carrier or utility. This position appears highly logical and in keeping with the terms and provisions of the cited Federal Property and Administrative Services Act of 1949. The General Accounting Office is without information warranting a conclusion that opposition by Government agencies to proposed general increases in rates has been undertaken solely because such increases, if made effective, would increase the cost of Government operations, though, of course, it agrees that such proposed increases should not be opposed solely to accomplish a saving of appropriated funds available to the several departments and agencies. The occasion for, and the extent of, the opposition by Government personnel to requests for general increases would seem to be a matter for the exercise of sound, informed, administrative judgment in individual cases. Abuses of discretion in any case will no doubt be properly adjusted when brought to the attention of the responsible officials in the departments or agencies involved. The General Accounting Office agrees, also, that the bargaining for rates or the playing off of one carrier against another by Government procuring officials, where it is known to the Government negotiators that such procedure is destructive of the ability of the competing

carriers to function, is not justified. It is not understood, however, how administrative officials of the Government can assume to determine that rates voluntarily tendered by the carriers should be rejected because, in the opinion of Government personnel involved, the rates may not be sufficiently productive of profitable revenue.

In view of what has been said above, the answer to the first specific question on page 2 of your letter is that the [fol. 1282] requirements of the national transportation policy are believed to be too comprehensive and indefinite to permit any satisfactory application by traffic managers for the Government in the discharge of their function in procuring transportation services. With respect to the second question, you are advised that it was and is the considered opinion of the General Accounting Office that traffic managers of the Federal Government are not charged directly with responsibility for the enforcement of the national transportation policy and that any attempt on their part to give it effect in procuring services at proper rates for the Government would result in uncertainty and confusion in the award of Government business, with understandable protest and objection from the carrier or carriers tendering rejected lower rates.

Considering now your reference particularly to the last paragraph and last sentence of the letter of April 13, 1951, from former Acting Comptroller General Yates to the Administrator of General Services, it is proper to call attention to the fact, as stated in the first paragraph of that letter, that it was written in response to a request from the addressee for review of a proposed regulation and for advice "as to concurrence or recommendations for changes and improvements therein." It was in the light of the request so made that the letter of April 13, 1951, was written. The conclusion expressed in that letter with respect to the effect of the national transportation policy is considered proper and will be given effect by this Office in the audit and settlement of transportation accounts. Applying that conclusion this Office will endeavor to see that payments made for services procured at reduced rates are audited in conformity with the reduced rates tendered and accepted. It will not assume to pass upon any question

as to whether the rates so tendered are or are not in conformity with the declarations of national transportation policy for the reason that it considers that the determination of any such question requires a consideration of extensive pertinent factors for the evaluation of which it does not have the necessary facilities, and for the further reason that it does not have authority finally to resolve any question of transgression of the national transportation policy that may be involved. If aggrieved carriers who consider themselves unwarranted victims of a disregard of the national transportation policy, notwithstanding that the award of the Government business by reason of which they may consider themselves aggrieved was made pursuant to specific statutory authority for them to furnish transportation for the United States at free or reduced rates, elect to contest the assumed violation, this Office considers that their protests or objections can be resolved finally and authoritatively only by a reference of the question to the Interstate Commerce Commission or the courts.

Sincerely yours,

E. L. FISHER
Acting Comptroller General
of the United States

[fol. 1283] DEFENDANT'S EXHIBIT "H"

(EMBLEM)

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

April 13, 1951

B-102080

The Administrator of General Services
General Services Administration

My dear Mr. Administrator:

Reference is made to your letter dated March 9, 1951, furnishing copies of a proposed "PERSONAL PROPERTY MANAGEMENT REGULATION" to be issued by your office on the

subject of "Transportation and Traffic Management," designed, as stated in the mentioned letter, "to effect economy and efficiency in the transportation of Government property, including the procurement of traffic information, rates and services." Your office requests that this Office review the document and furnish advice as to concurrence or recommendations for changes or improvements therein.

As indicated in your letter, section 201 of the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, provides that the Administrator shall to the extent that he determines it is advantageous to the Government in terms of economy, efficiency, or service, "prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including * * * transportation and traffic management." This is consistent also with the declaration of policy contained in section 2 of said act. The present proposed regulation appears to be a step in the direction of systematic and coordinated [fol. 1284] procedures in the procurement of transportation services and generally should promote orderly improvements and effectiveness in practices covering the transportation of Government property. Any proposal which contemplates economy and efficiency in Government transportation and traffic management, as in this instance, if properly managed and observed, should result in the conservation of public funds appropriated for that purpose.

Giving consideration to particular provisions of the proposed regulation, it is believed that the addition of a requirement in paragraph 4 for showing car number and initials of cars involved in carload shipments would contribute to definiteness, particularly in instances in which shipments may move under commercial bills of lading. It seems possible also that administrative agencies would be aided in their functioning under this paragraph if required to retain a copy of each bill of lading for a stated period of, say, not less than three years.

Concerning item 5, it is noted that the word "recurring," in the third line of this item, may be subject to different interpretations. It may be advisable to specify the number of carload or truckload movements within a definite period

of time, as, for example, 10 or more carload or truckload movements within any single month. There has been an urgent need for a program of the type contemplated, to afford the Government a sound basis for initiation of proper proceedings before regulatory bodies or other action [fol. 1285] seeking favorable adjustments in applicable freight rates and charges or modification of unreasonable tariff requirements.

It is noted that item 6(a) makes specific reference to section 22 of the Interstate Commerce Act, as to interstate movements, and to comparable provisions of state regulatory laws, as to intrastate movements. To bring attention to the availability of other transportation agencies authorized to carry Government freight free or at reduced rates, it is suggested that item 6(a) might well include also a reference to 49 U.S.C. 317(b), 906(c), 1006(c), and a general reference to similar provisions in state regulatory laws, pertaining to motor common carriers, water common carriers, and freight forwarders, respectively.

In connection with item 6(d) it may be observed that prompt notification, to this Office, of changes created by agreement between Government agencies and carriers affording the Government lower-than-tariff rates, or rates and services not authorized in published tariffs, is essential to the full protection of the Government's interest in the audit of carriers' bills by the General Accounting Office. Accordingly, it would assist in the orderly examination of affected transportation accounts and tend to minimize disruption of the audit program conducted by this Office, if item 6(d) may be amended to embody a direction that a signed copy of any quotation or concession in the matter of rates or services, or, if no such signed tender results, then copies of the forms designated as Appendix A and Appendix B, be forwarded directly, and promptly, upon [fol. 1286] signing, to the General Accounting Office, wherever the negotiations result in a concession or accepted quotation.

Since the proposed regulation has for its indicated purpose the effectuation of economy and efficiency in the transportation of Government property, being consistent in this respect with the general purpose of section 201 of the

Federal Property and Administrative Services Act of 1949 and with the imperative need for prudent and efficient application of appropriated moneys to the payment of the considerable transportation bill annually incurred by the Government, the purport of item 6(f), if intended to serve as an inviolate rule for the guidance of public officials responsible for the transportation activities of the Government, seems likely to inject considerations which because of their generalities may render negotiating operations so uncertain as to preclude the Government from advantages, to which, under other provisions of the act, as construed by the courts, it could become entitled through free negotiation. Said item 6(f) apparently requires executive agencies, including the General Services Administration, in their function of negotiation, to observe the statement of the national transportation policy enunciated in the Transportation Act of 1940, 54 Stat. 898, 899, as a controlling element in the determination of the propriety of "negotiations for, and the unsolicited tender by carriers of, special rates, and services." The pertinent provision of the law which precedes part 1 of the Interstate Commerce Act, states:

> [fol. 1287] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to * * * foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *."

This provision of the law, amended the Interstate Commerce Act, chapters 1, 8, 12, and 13 of 49 U.S.C., which relate to the regulation of carriers by railroad, by motor vehicle, and by water, and freight forwarders, respectively. Implementation of the national transportation policy as here set forth appears to be entrusted to the care and

management of the Interstate Commerce Commission which is peculiarly equipped and has or can assemble and examine comprehensive data and information necessary to give proper effect to this policy. In this connection it is noted that the Supreme Court of the United States has characterized the national transportation policy as the "Commission's guide to 'the public interest.'" See *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82, where it is stated:

> "* * * That policy, which is the Commission's guide to 'the public interest' * * * demands that all modes of transportation subject to the provisions of the Interstate Commerce Act be so regulated as to 'recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers * * *.'"

And in *I.C.C.* v. *Parker*, 326 U.S. 60, 66, it is stated that the declaration of the national transportation policy "requires administration so as to preserve the inherent advantages of each method of transportation" and that "the [fol. 1288] solution lies in the balancing by the Commission of the public interests in the different types of carriers with due regard to the declared purposes of Congress."

It is difficult to understand how shipping or procuring officers of the Government, not having available to them the detailed facts normally produced before, or available to, the regulatory bodies, and not enjoying ordinarily the broad perspective which those bodies acquire through their comprehensive study of related transportation facilities, can be expected adequately to balance and apply the factors inherent in the application of the stated policy or how they can, with any degree of uniformity and certainty, govern their acceptance or rejection of tenders by carriers primarily through attempted observance of the elements of such policy. The statement of the national transportation policy in the Interstate Commerce Act makes no reference to section 22, or to similar exempting provisions which sanction transportation performed for the Government free

or at reduced rates, and neither section 22 nor other similar provisions have been amended to indicate that an obligation is imposed on Government shipping officers to condition their acceptance or rejection of any tender of service free or at reduced rates because of a consideration of the national transportation policy. On the contrary section 22 of the act seems to have been viewed as making it incumbent upon Government shipping officers to obtain and accept tenders of reliable carriers where it is established that [fol. 1289] such action will result in reduced transportation cost without sacrifice of efficiency. In this connection it is noted that as recently as 1944, the Supreme Court of the United States, in considering operations under an agreement made in pursuance of said section 22, stated in *Southern Railway Company* v. *United States*, 322 U.S. 72, 77: "We must assume that the contracting officers for the United States drove as provident a bargain as a reading of the agreement fairly permits." It is believed, therefore, that the effect of item 6(b) in the proposed regulation, relating to *"National Transportation Policy"* would be to impose an unwarranted burden upon interested Government agencies in their negotiations for reduced rates and that it may prejudice the rights of the United States to benefits tendered or available to it under specific statutory enactments. So far as the matter may be for official consideration by this Office in connection with the audit of said accounts or otherwise, it is considered necessary that the validity and effect of reduced rate tenders or other concessions offered the Government under the provisions of section 22 of the Interstate Commerce Act, and comparable provisions relating to transportation facilities other than railways, be determined independently of the provisions establishing the national transportation policy.

Sincerely yours,

FRANK L. YATES
Acting Comptroller General
of the United States

[fol. 1290] DEFENDANT'S EXHIBIT "J"

EXHIBIT SHOWING TREND OF MOTOR CARRIER FREIGHT RATES

ON

GOVERNMENT TRAFFIC WITHIN THE STATE OF CALIFORNIA

BETWEEN REPRESENTATIVE POINTS

PERIOD MAY 15, 1952 TO MARCH 26, 1956

PART V - "FREIGHT, ALL KINDS" (1); BETWEEN BARSTOW (AREA) AND CAMP PENDLETON

Date Effective (on or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Other (4) (Typical Individual Carrier Quotations)	Cal.P.U.C. Minimum 5th Class (2)
5/15/52	34(40M) Nebo 35(40M) Yermo	35 (40M)	35(40M)	35(40M) Nebo 35(40M) Yermo		34(Nebo) 35(Yermo)
7/15/52	34(40M)plus 9% Nebo 35(40M)plus 9%Yermo	35(40M)plus 9%	35(40M)plus 9%	34(40M)plus 9% Nebo 35(40M)plus 9% Yermo		34 plus 9%(Nebo) 35 plus 9%(Yermo)
3/20/53	38(40M)Nebo 39(40M)Yermo	38(40M)	38(40M)Nebo 39(40M)Yermo	38(40M)Nebo 39(40M)Yermo		38(Nebo 39(Yermo)
10/31/53	40(40M) Nebo 41(40M) Yermo		11/1/53 40(40M)Nebo 41(40M)Yermo	40(40M)Nebo 41(40M)Yermo		40 (Nebo) 41 (Yermo)
8/1/55 (Except as Noted)	40(40M)plus 5% Nebo 41(40M)plus 5% Yermo		37(36M) Nebo 38(36M) Yermo 2/24/56 36(36M) Cunha	40(40M)plus 5% Nebo 41(40M)plus 5% Yermo	37 plus 5% Nebo * 38 plus 5% Yermo * (Class B)	40 plus 5% (Nebo 41 plus 5% (Yermo)

* Effective 10/1/55 via Service Lines Inc. and 2/11/56 via Asbury System.

(See Page A for explanation of notes and abbreviations)

PART VI "FREIGHT, ALL KINDS" (1) TRUCKLOADS; BETWEEN CHELI AIR FORCE BASE (MAYWOOD) AND MC CLELLAN FIELD (SACRAMENTO)

Date Effective (on or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Cal.P.U.C. Minimum (4th Class as Typical for Air Force Materiel)
5/15/52	No Freight All Kinds. Class rates only apply.				68
7/15/52 (Cal.PUC Gen.Inc.)					68 plus 9% S/C(6/24/52)
3/20/53 (Cal.PUC Gen.Inc.)					75(3/1/53)
6/5/53				51(40M)Zimm.	75
7/9/53			51(40M) Leeds		75
7/22/53				50(40M) Spec.	75
9/5/53			61(40M)Leeds, Aetna		75
9/15/53	61(40M)				75
9/28/53				61(40M)	75
10/31/53(Combined) (Cal.PUC Gen.Inc.)	63½(40M)		(11/1/53)63½(40M) All Carriers	63½(40M)	79 (9/10/53)
4/20/54	42½ (42M) (Spec.)		42½(40M)(Spec.)		79
5/6/54				42½(42M)(Spec.)	79
6/1/54			41(40M)(via Paxton)		79
7/9/54			41 (40M)		79
7/20/54				41(40M)(Spec.)	79
7/21/54			35(40M)(Spec.)		79
8/1/54	35(40M)(Spec.)				79
9/14/54				(N)35(40M)(Spec.)	79

[fol. 1298]

PART VI CONCLUDED

Date Effective (on or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Cal.P.U.C. Minimum (4th Class as Typical for Air Force Materiel)
10/1/54		(N)31(40M)(WFL)(E) (S)34(40M)(WFL)(E)			79
10/22/54			32½(40M)(CCTL)		79
8/1/55 (Cal.PUC Gen.Inc.)					79 plus 5% S/C
3/21/56 (X)	37½(40M) 35(40M)(Spec.) 58½(40M)plus 5% S/C (3)		58½(40M)plus 5% S/C (3)	58½(40M)plus 5% S/C(3) (N)32½(40M)plus5%S/C(Spec.) (N)37½(40M)*	79 plus 5% S/C

(X) Rates as effective on date of compilation (does not indicate effective date)
* Via Azusa Transfer Co. only
(See Page A for explanation of other symbols and abbreviations)

PART VII - "FREIGHT, ALL KINDS" (USUAL EXCEPTIONS); FROM SAN DIEGO (AREA) TO LOS ANGELES (AREA), LESS TRUCKLOAD

In Agency "Government Quotations" of:

Date Effective (on or about)	Loretz	Nickerson	Ahl	Beeler	3rd Class as Typical
5/15/52	class 1 140 2 126 3 112 4 98	class 1 140 2 126 3 112 4 98	class 1 140 2 126 3 112 4 98	class 1 140 2 126 3 112 4 98	112
7/15/52	1 140 plus 9% S/C 2 126 plus 9% S/C 3 112 plus 9% S/C 4 98 plus 9% S/C	1 140 plus 9% S/C 2 126 plus 9% S/C 3 112 plus 9% S/C 4 98 plus 9% S/C	1 140 plus 9% S/C 2 126 plus 9% S/C 3 112 plus 9% S/C 4 98 plus 9% S/C	1 140 plus 9% S/C 2 126 plus 9% S/C 3 112 plus 9% S/C 4 98 plus 9% S/C	112 plus 9% S/C
3/20/53	1 160 2 144 3 128 4 112	1 160 2 144 3 128 4 112	1 160 2 144 3 128 4 112	1 160 2 144 3 128 4 112	128
10/31/53		1 168 2 151 3 134 4 118	1 168 2 151 3 134 4 118	1 168 2 151 3 134 4 118	134
9/10/54				(9/1/54)106(90% of 4) from San Diego to Los Angeles	134
10/11/54	.106 FAK (90% of 4th class) from San Diego to Los Angeles (SDF)				134
12/1/54				118(4th Class)Zimmerman	134
4/22/55			106(90% of 4th class) SDFF only		134

PART VII CONCLUDED

In Agency "Government Quotations" of:

Date Effective (on or about)	Loretz	Nickerson	Ahl	Beeler	3rd Class as Typical
8/1/55	Class 1 2 3 4	168 plus 5% S/C 151 plus 5% S/C 134 plus 5% S/C 118 plus 5% S/C	Class 1 168 plus 5% S/C 2 151 plus 5% S/C 3 134 plus 5% S/C 4 118 plus 5% S/C	Class 1 168 plus 5% S/C 2 151 plus 5% S/C 3 134 plus 5% S/C 4 118 plus 5% S/C	134 plus 5% S/C
3/21/56 (X)	106	FAK (90% of 4th Class) from San Diego to Los Angeles plus 5% S/C (SDF)	106 (90% of 4) (SDFF only) plus 5% S/C	118 (4th Class) plus 5% S/C (Zim.)	135 plus 5% S/C

(X) Indicates currently effective; does not indicate effective date.
(See Page A for explanation of symbols and abbreviations)

[fol. 1302] DEFENDANT'S EXHIBIT "K"

CALIFORNIA PUBLIC UTILITIES COMMISSION GENERAL RATE ADJUSTMENTS
IN "MINIMUM RATE TARIFF NO. 2" (GENERAL COMMODITIES, STATEWIDE)
SUBSEQUENT TO MAY 15, 1952

DECISION NO.	DATE	EFFECTIVE DATE OF RATES	INCREASE
47245	6/9/52	6/24/52	9% (Surcharge) all rates and charges
47574	8/11/52	9/22/52	(Extended above to 12/31/52)
48015	12/9/52	12/31/52	(Extended above to 2/28/53)
48189	1/19/53	3/1/53	Revised rates upward varying percentages
(48211)	1/27/53	2/16/53	(Extended rail 6% X-175 surcharge-as originally effective 1/7/51 to 1/28/54)
48958	8/10/53	9/10/53	5%
(49290)	11/3/53	11/13/53	(Rail 15% in lieu 9%)
(49291)	11/3/53	11/13/53	(Authorized Highway Common Carriers reflect Decision 49290 rail increase)
51688	7/18/55	8/1/55	5%

- -

(-----) Indicates Decisions directed to railroad rates but reflected in application on "rail competitive" rates of motor carriers subject to Minimum Rate Tariff No. 2.

EXPLANATION OF NOTES, ABBREVIATIONS AND SYMBOLS USED

GENERALLY THROUGHOUT EXHIBIT PAGES FOLLOWING:

(1) "Freight, All Kinds", subject to specified exclusions, in Truckloads (Lowest rate, subject to highest minimum weight, only, shown)

(2) California Public Utilities Commission Minimum Rates include no "Freight, All Kinds" rates between points involved. Any and all "Freight, All Kinds" rates are reduced rates to the government. 5th Class rates shown under "Cal. P.U.C. Minimum" Column are solely for purpose of indicating trend of Cal. P.U.C. minimum-prescribed rates applicable to commercial traffic during period covered by this government rate study.

(3) Only for account of those carriers who are not parties to competitive reduced (spec.) rates.

(4) It is not purported that all "Individial Quotations" are shown. Those shown are typical.

(N) Northbound only. (S) Southbound only. M- Minimum Weight in 1,000 Pounds
(E) Rates have been allowed to expire; not currently effective.
S/C Surcharge (Increase added to total charges in form of surcharge)
(Spec.) - Indicates rate shown published for account of specific carriers only; not general in application.

CCTL - Coast Counties Truck Line.
CTC - Constructors Transport Co.
BTC - Blincoe Trucking Co.
L&E - L & E Trucking Co.
WFL - Willig Freight Lines
SCFL - Southern California Freight Lines
SDF - San Diego Forwarding Co.

[fol. 1292]

(Part I consists of 2 pages)

PART I - "FREIGHT, ALL KINDS" (1); BETWEEN SAN FRANCISCO-OAKLAND AREA AND LOS ANGELES AREA

Date Effective (On or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Other: (4) (Typical Individual Carrier Quotations)	Cal. P.U.C. Minimum (5th Class)(2)
5/15/52	45 (40M)	45 (40M)	45 (40M)	45 (40M)		45
7/15/52(Cal.P.U.C. Gen. Increase)	45(40M)plus 9% S/C	45(40M)plus 9% S/C 7/22/52	45(40M)plus 9% S/C	45(40M)plus 9% S/C		45 plus 9% S/C
3/20/53(Cal.P.U.C. Gen. Increase)	51 (40M)	51 (40M)	51 (40M)	51 (40M)		51
10/31/53	(Loretz & Nickerson Quotations Consolidated)					
10/31/53(Cal.P.U.C. Gen. Increase)	53 (40M)		53 (40M)	53 (40M)		53
3/26/54					42½ (All State)	53
4/20/54	42½ (42M) (Spec.)		42½(40M)(Spec.)			53
5/6/54				42½(42M)(Spec.)		53
6/1/54			41(40M)(via Paxton)			53
7/1/54					40(30M)(All State)	53
7/9/54			41 (40M)			53
7/20/54				41 (40M)(Spec.)		53
7/21/54			35(40M)(Spec.)			53
8/1/54	35 (40M) (Spec.)					53
9/14/54				(N)35(40M)(Spec.)		53

(See Page A for explanation of symbols and abbreviations)

PART I CONCLUDED

Date Effective (On or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Other: (4) (Typical Individual Carrier Quotations)	Cal. P.U.C. Minimum (5th Class)(2)
10/1/54		(N)31(40M)(WFL)(E) (S)34(40M)(WFL)(E)				53
10/22/54			32½(40M)(CCTL)			53
2/28 & 3/5/55					40(30M)(Alves; All State)	53
8/1/55 (Cal.P.U.C. Gen. Increase)	53(40M) plus 5% S/C (3)	49(36M)plus 5%S/C(Spec.) 53(40M)plus 5% S/C (3) Others - Various	49(36M)plus 5% (3) Others - Various	53(40M)plus 5% (3)		53 Plus 5%
9/15/55				49(36M)plus 5% S/C (3)		53 plus 5%
10/1/55					40(30M)(Service Lines Inc.)	53 plus 5%
1/25/56	(N)32½(40M)(Via CTC) (S)35(40M)(Via CTC)		(N)35(40M)(CCTL) (S)31(40M)(CCTL)	41(40M)plus 5%(Spec.) (N)32½(40M)plus 5% (Spec.)		53 plus 5%
3/26/56		37½(40M)(Via BTC & L & E)				53 plus 5%

(See Page A for explanation of symbols and abbreviations)

[fol. 1294]

PART II - "FREIGHT, ALL KINDS" (1); BETWEEN SAN FRANCISCO-OAKLAND AND SAN DIEGO

Date Effective (on or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Other: (4) (Typical Individual Carrier Quotations)	Cal. P.U.C. Minimum (5th Class)(2)
5/15/52	67 (40M)	67 (40M)	67 (40M)	67 (40M)		67
7/15/52 (Cal.PUC Increase)	67(40M)plus 9% S/C	67(40M)plus 9% S/C (7/22/52)	67(40M)plus 9% S/C	67(40M)plus 9% S/C		67 plus 9% S/C
3/20/53 (Cal.PUC Increase)	77(40M)	77(40M)	77(40M)	77(40M)		77
10/31/53 (Cal.PUC Increase)	80½ (40M)		80½(40M)(11/1/53)	80½(40M)		80½
4/21/54	65(42M)(Spec.)					80½
6/1-6/30/54	60(40M)(Spec.)(6/15/54)		(6/1/54)70(40M)(Paxton) (6/28/54)60(40M)(Spec.)			80½
7/1-8/31/54			(7/21/54)55(40M)(Spec.)	(7/20/54)60(40M)(Spec.) (8/12/54)(N)55(40M) (SCFL)		80½
10/1-12/31/54	(N)44(40M)(WFL)(E) (10/1/54)(S)49(40M)(WFL)(E)		(10/22/54)50(40M)(CCTL)			80½
1/1-1/31/55	(1/5/55) 55(40M)(Spec.)			(1/15/55)(N)50(40M) (SCFL)		80½
2/28/55					58(30M)(All State) (15)	80½
8/1/55 (Cal.PUC Increase)	80½(40M)plus 5% S/C (3)		74(36M)plus 5% S/C (Class B)(3)	80½(40M)plus 5%S/C(3) 74(36M)plus 5%S/C(Spec.)		80½ plus 5% S/C
1/23/56	50(40M)(L&E)					80½ plus 5% S/C
2/24/56			55(40M)(Cunha)			80½ plus 5% S/C

(15) Rate applies including to points and places within 15 miles of San Diego
(See Page A for explanation of other notes and abbreviations)

PART III - AMMUNITION AND EXPLOSIVES - BETWEEN PORT CHICAGO AND SEAL BEACH

Date Effective (on or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Other: (4) (Typical Individual Carrier Quotations)
5/15/52	70 (30M)	70 (30M)	70 (30M)	70 (30M)	
7/15/52	70 (30M)	70 (30M)	70 (30M)	70 (30M)	
3/20/53	70 (30M)	70 (30M)	70 (30M)	70 (30M)	
10/31/53	70 (30M)				
3/26/54					42½(42M)(All State)(A)
4/20/54-5/6/54	42½(42M)(A)(Spec.)		42½(42M)(A)(Spec.)	(5/6/54)42½(42M)(Spec.)	
7/1/54	41(40M)(A)(Cunha)		41(40M)(A)	41(40M)(Spec.)	40(30M)(All State)
8/1/54	35(40M)(A)(Spec.)				
10/1/54	40(30M)(Spec.) 35(40M)(Spec.)				
3/5/55					40(30M)(A)(Via Alves)
8/1/55	70(30M)(3) 40(30M)(Spec.) 35(40M)(Spec.)		70(30M)(3) 41(40M)(A)	70(30M)(3) 41(40M)(Spec.)	
2/24/56			40(30M)(Spec.)		

(A) "Ammunition" only.
(See Page A for other explanations of symbols and abbreviations)

[fol. 1296]

PART IV - "FREIGHT, ALL KINDS" (1); BETWEEN BARSTOW (AREA) AND SAN FRANCISCO (AREA)

Date Effective (on or about)	In Agency "Government Quotations" of: Loretz	Nickerson	Ahl	Beeler	Other: (4) (Typical Individual Carrier Quotations)	Cal. P.U.C. Minimum 5th Class (2)
As of May 15, 1952	66(40M)	66(40M)	66(40M)	66(40M)		66
7/15/52 (Cal.PUC Increase)	66(40M)plus 9% S/C	66(40M)	66(40M)plus 9% S/C	66(40M)plus 9% S/C		66 plus 9% S/C
2/19/53	60(36M)plus 9% S/C					66 plus 9% S/C
3/20/53 (Cal.PUC Increase)	69(40M)		60(36M) 69(40M)	69(40M)		69
4/16/53-4/24/53	65(40M)	65(40M)	65(40M)			69
10/31/53 (Incl. Cal.PUC Increase)	65 (40M)		72(40M)	72(40M)		72
3/26/54					50(42M)(All State)	72
4/21/54	50(42M)(Spec.)		50(42M)(Spec.)			72
6/15/54	47½(40M)(Spec.)		47½(40M)(Spec.)	47½(40M)(Spec.)		72
7/1/54					46(30M)(All State)	72
10/1/54-11/25/54	(N)45(40M)WFL(E)		45(40M)(Spec.)	(N)45(40M)(Spec.)		72
3/5/55					46(30M) Alves	72
8/1/55 (Cal.PUC Increase)	45(40M)(Spec.) 72(40M)plus 5% S/C (E) 3		45(40M)(Spec.) 66(36M)plus 5% S/C (E) 3	45(40M)(Spec.) 72(40M)plus 5% S/C (E) 3 66(36M)plus 5% S/C (E) 3		72 plus 5% S/C
10/1/55					46(30M)(Service Lines Inc.)	72 plus 5% S/C
2/16-2/24/56			45(40M)(Cunha)	45(40M)(Spec.)		72 plus 5% S/C

(See Page A for explanation of notes and abbreviations)

[fol. 1303] DEFENDANT'S EXHIBIT "L"

PACIFIC SOUTHCOAST FREIGHT BUREAU
TARIFF NO. 300, CAL.P.U.C. NO. 102
J. P. HAYNES, AGENT

Item No.	Commodity	From	To	Rate in Cents Per 100 Pounds	Minimum Weight in Pounds
800	Canned Goods				
3420		San Francisco)		43	36,000
3455		Oakland)	Los Angeles)	38	50,000
3460		Stockton)	Barstow)	29	80,000
3485		Sacramento)			
3550					
6180	Paint	Richmond	San Diego	77	30,000
6185		San Francisco	Fresno	30	30,000
6195		Los Angeles	Bakersfield	38	30,000
1480	Roofing, Building or Paving Materials	San Francisco	San Luis Obispo	32	30,000
		"	"	29	80,000
		Los Angeles	San Bernardino	14	30,000
6560	Rubber Goods, viz.:				
6562	Batteries, Hose, Wheel Rims, Camel Back, Mallets	San Francisco	Los Angeles	60	30,000
		"	"	69	24,000
3260	Wire, Copper, Plain	San Francisco	Los Angeles	51	30,000
3265	or Insulated Cable, Copper, Armored			38	50,000
6255	Plumber Goods, viz.:				
	Bath Tubs,	San Francisco	Los Angeles	52	30,000
	Lavatories,	"	San Diego	59	30,000
	Sinks, Urinals	Los Angeles	Fresno	52	30,000
	Drinking Fountains				
	Pipe Fittings				
6660	Soap	San Francisco	Los Angeles	42	30,000
				36	50,000

[fol. 1304]

PACIFIC SOUTHCOAST FREIGHT BUREAU
TARIFF NO. 252-D, CAL.P.U.C. NO. 183
J. P. HAYNES, AGENT

Item No.	Commodity	From	To	Rate in Cents Per 100 Pounds	Minimum Weight in Pounds
760	Petroleum, viz.:	Group 2			
5654	Oil, Grease,	Richmond	Sacramento	25	20,000
	Blended Gasoline,		"	20	30,000
5838	etc.		Bakersfield	64	20,000
	In Packages		"	45	30,000
5688			Marysville	24	30,000
		Group 9			
7224		Bakersfield	Lathrop	37	30,000
		Group 22			
9684		Los Angeles	Sacramento	50	30,000
9790			Fresno	44	30,000
9884			Monterey	50	30,000
9656			Lathrop	55	30,000

[fol. 1305]

PACIFIC SOUTHCOAST FREIGHT BUREAU FREIGHT
TARIFF 294 OF AGENT J. P. HAYNES
(TRAILER FLAT CAR TARIFF)

Item No.	Commodity	From	To	Rate in Cents Per 100 lbs.	Minimum Weight in Pounds
1300	Drugs, Medicines, Toilet Preparations	San Francisco	Los Angeles	58	30,000
1310	Copper Wire	Stockton	Los Angeles	51 38	30,000 50,000
1340	Canned Foodstuffs	Sacramento	Los Angeles	33	50,000
1360	Coffee	San Francisco	Los Angeles	53 46	30,000 50,000
1430	Iron or Steel Articles-Beams, Fencing, Pipe	Kaiser	San Francisco	55 51 38	30,000 40,000 60,000
1500	Wine	Fresno	San Diego	39 45	50,000 30,000
1520	Paint	San Francisco	Los Angeles	51	30,000
2130-A	Sugar	Crockett	Los Angeles	42	30,000

[fol. 1306] DEFENDANT'S EXHIBIT "M"

(This Exhibit is printed as Appendices to the Motion to Dismiss commencing at page 95—omitted.)

[fol. 1307] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing)

[fol. 1308] IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1956

STIPULATION

The parties to the above cause hereby stipulate that either party may refer in its briefs or oral argument to any portion of the record, as filed in this Court, which has not been printed, and that this stipulation should be printed by the Clerk of this Court.

Everett C. McKeage, Counsel for Appellant
J. Lee Rankin, Solicitor General, Counsel for Appellee

January 4, 1957

[fol. 1309] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—December 3, 1956

Appeal from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

December 3, 1956

In the S

Uni

PUBLIC UTILITIES COMM
OF CALIFORNIA,

vs.

UNITED STATES OF AMER

On Appeal from th
for the North
Sou

JURISDICT

JOHN T. FEY, Clerk

upreme Court

OF THE

ed States

ER TERM, 1956

No. 447

SION OF THE STATE

Appellant

Appellee.

United States District Court
n District of California,
hern Division.

ONAL STATEMENT.

EVERETT C. MCKINLEY,
Chief Counsel,
J. THOMASON PHILLIPS,
Senior Counsel,
WILLIAM R. ROCHE,
Senior Counsel,
6 State Building, San Francisco 2, California,
Attorneys for Appellant,
Public Utilities Commission
of the State of California.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

JURISDICTIONAL STATEMENT.

Appellant is fully aware of the desire of the Supreme Court that the jurisdictional statement required by Rules 13 and 15 be as brief as possible. Appellant believes, however, that this appeal involves numerous questions of unusual gravity and public interest, and that a comprehen-

sive statement is necessary to assist the court to an understanding of those problems and of the context in which they arise.

Appellant appeals from the final judgment of the United States District Court for the Northern District of California, Southern Division, entered on June 5, 1956, declaring a statute of the State of California to be invalid as contravening certain provisions of the Constitution of the United States, and granting a permanent injunction prohibiting any action under said statute. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of California, Southern Division, is reported in 141 F. Supp. 168. A copy of said opinion and of the findings of fact, conclusions of law and judgment entered by said Court are attached hereto as Appendix A.

JURISDICTION.

This suit was brought under 28 U.S.C., Sections 1331, 2201, 2281 and 2284, seeking an adjudication that Section 530 of the Public Utilities Code of the State of California is unconstitutional and void, and requesting injunctive relief restraining the Public Utilities Commission of the State of California from taking any action under said

statute. The Judgment of the District Court was dated and entered on June 5, 1956, and Notice of Appeal was filed in that Court on July 31, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Radio Corp. of America v. U. S.* (1950), 341 U.S. 412; *Public Utilities Comm. of Calif. v. United Air Lines, Inc.* (1953), 346 U.S. 402.

STATUTES INVOLVED.

This appeal involves the validity of California Statutes of 1955, Vol. 2, p. 3608, Chapter 1966 (California Public Utilities Code, Section 530, as amended) which is as follows:

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> "(a) Persons ~~or property~~ for the United States, state, county, or municipal governments; or *persons or property* for charitable or patriotic purposes, or to provide relief in cases of general epidemic, pestilence, or calamity.
>
> "(b) Property to or from fairs or expositions for exhibit thereat.
>
> "(c) Contractors and their employees, material or supplies for use or engaged in carrying out their contracts with such carriers, for construction, operation, or maintenance work or work incidental thereto on the line of the issuing carrier, to the extent only that such free or reduced rate transportation is pro-

vided for in the specifications upon which the contract is based and in the contract itself.

"Common carriers may also enter into contracts with telegraph and telephone corporations for an exchange of service.

"*The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permitted carriers as defined in the Highway Carriers' Act.*"*

This appeal also involves the following portions of the Constitution of the United States (attached hereto as Appendix B): Article I, Section 8, Clause 3 (Interstate Commerce), Clause 12 (Support Armies), Clause 13 (Maintain Navy), Clause 16 (Militia), Clause 17 (Forts, etc.), Clause 18 (Make Laws to Execute Powers); Article IV, Section 3, Clause 2 (Rules re Property of United States); Article VI, Clause 2 (Supreme Law of Land); Amendment XIV, Section 1 (Due Process).

Also involved are the following Federal statutes (pertinent portions of which are attached hereto as Appendix C): 28 U.S.C., Section 1342 (62 Stat. 932) (Johnson Act); 28 U.S.C., Section 2201 (68 Stat. 890) (Declaratory

*The words shown above as stricken were deleted, and those shown in italics were added, by the 1955 amendment.

Relief); 49 U.S.C., Section 22 (58 Stat. 751) (Interstate Commerce Act); 41 U.S.C., Section 151 (62 Stat. 21) (Armed Services Procurement Act of 1947, as amended); 40 U.S.C., Sections 471 (68 Stat. 1126), and 481(a)(4) (64 Stat. 591) (Federal Property and Administrative Services Act of 1949, as amended).

QUESTIONS PRESENTED.

A. Preliminary or Threshold Question.

Did the District Court have jurisdiction to entertain the complaint?

(1) Did the complaint allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201?

(2) Did the Plaintiff (Appellee) fail to exhaust the administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California?

(3) Did the complaint involve a matter which is within the primary jurisdiction of the Public Utilities Commission as an administrative agency of the State of California?

(4) Was the District Court prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff (Appellee)?

(5) Did the complaint allege facts showing irreparable injury to the Plaintiff (Appellee) in the absence of injunctive relief?

(6) Did the Plaintiff (Appellee) have an adequate remedy elsewhere than in the District Court?

(7) Was the District Court required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California?

B. Evidentiary Questions.

(1) Did the District Court err in overruling Defendant's (Appellant's) objections to questions calling for expressions of opinions by Plaintiff's (Appellee's) witnesses upon the ultimate issues in the case?

(2) Did the Plaintiff (Appellee) prove at the trial, by a preponderance of the evidence, that it would suffer irreparable injury in the absence of injunctive relief?

C. Ultimate Question.

Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Appellant (hereinafter referred to as the "Commission") is a body duly constituted, and has its jurisdiction prescribed, by the Constitution and statutes of the State of California, for the purpose, among others, of regulating the intrastate rates of commercial carriers for transportation of property between points in the State of California.

In 1954, and for many years prior thereto, those common carriers in California which filed their own tariffs and were regulated as public utilities, had a right to transport property of the United States free or at reduced rates. This right was expressed in Section 530 of the Public Utilities Code of the State of California, prior to its amendment.

In June of 1954, a formal petition was filed with the Commission by a group of motor vehicle carriers alleging in substance that the United States Government is the largest single shipper of commodities moving between points in the State of California; that carriers transporting property of the United States between such points were assessing therefor unreasonably low and depressed rates; and that such practices were creating chaotic transportation conditions in the movement of such goods, were having a depressing influence upon the revenues of carriers, and, if continued, would result in creating a burden on other traffic. The petition requested that the matter be set for public hearing and that the Commission take appropriate steps to grant relief.

A number of hearings were had upon this petition at which an appearance was entered by counsel "for the

Armed Forces, Bureau of Supplies and Accounts, Code HA-1, Navy Department, Washington, D.C."

On June 25, 1955, the Commission issued a decision (No. 51047, attached hereto as Appendix D) in which it found in substance that the allegations of the petition were true. In its decision the Commission granted certain relief that was necessarily contingent upon cooperation by the United States Government in requiring carriers to file with the Commission special rate quotations offered for United States Government traffic before they became effective. Thereafter the Commission was informed by the petitioning carriers that such cooperation had been refused.

In July, 1955, the Legislature of the State of California amended said Section 530 of the Public Utilities Code. This amendment withdrew from common carriers the unlimited right to transport property of the United States Government free or at reduced rates and empowered the Commission to permit such reduced rates to such extent and subject to such conditions as it considers reasonable.

This statute was to become effective on September 7, 1955. It would affect, however, only those common carriers who filed their own tariffs and were regulated as public utilities. On August 16, 1955, therefore, the Commission issued a decision cancelling a certain provision in one of the minimum rate tariffs previously established by it for application to the transportation of general commodities, in order to revoke the right of carriers bound by that tariff to deviate from such minimum rate tariff for the transportation of property of the Armed Forces of the United States. (Decision No. 51832, at-

tached hereto as Appendix E.) This decision, by its terms, was to become effective on September 7, 1955, contemporaneously with the amendment to Section 530 of the Public Utilities Code.

On August 25, 1955, a public hearing was held for the purpose of reconsidering the matters raised by the carriers' petition above referred to. At this hearing an appearance was entered by an attorney as "Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the United States Government." At the conclusion of said hearing the matter was taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of said Decision No. 51832.

On August 26, 1955, the Department of Defense of the United States Government, pursuant to the right reserved to it, filed with the Commission a petition in substance acquiescing in Commission regulation of rates for the transportation of its property, and merely requesting a postponement thereof for 90 days or until new rates acceptable to the Commission could be negotiated.

On September 6, 1955, the Commission issued a new decision in which it ordered that the cancellation of the right to deviate from the minimum rate tariff above referred to was "hereby" made "effective December 5, 1955." (Decision No. 51922 attached hereto as Appendix F.) The opinion states that the cancellation of this right was postponed "in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and

to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended."

By a petition filed November 21, 1955, the United States Department of Defense sought a further 60-day postponement.

On November 29, 1955, the Commission denied this petition, giving its reasons therefor (Decision No. 52287, attached hereto as Appendix G).

As a result the withdrawal of the privilege of carriers to transport property of the United States Government free or at reduced rates was to become effective at 12:01 A.M. on December 5, 1955, which was a Monday. In the afternoon of the preceding Friday, December 2, 1955, the United States filed in the United States District Court for the Northern District of California, Southern Division, a complaint against the "Public Utilities Commission of the State of California" as the sole defendant, requesting that said Section 530 of the Public Utilities Code be declared unconstitutional and void insofar as it prohibits carriers from transporting property of the United States at rates other than those approved by the Commission, and requesting injunctive relief. *There was nothing whatever in the complaint alleging that the Commission had done anything, or that it was about to do anything, or that it had threatened to do anything, adverse to the plaintiff; nor was there a single word about the prior proceedings before the Commission or about the Commission's order of September 6, 1955.*

The injunctive relief requested in the complaint was entirely prohibitory in form, the request being merely that the Commission be prevented, restrained, enjoined and prohibited *from* doing certain things.

Upon filing the complaint, counsel for the Government applied to the District Court for a temporary restraining order, and orally informed the District Court that the Commission had previously taken affirmative action to implement Section 530 of the Public Utilities Code, and that that action was scheduled to become effective at 12:01 A.M. on Monday, December 5, 1955.

The Commission was given an opportunity to be heard upon the question of whether or not a restraining order should issue. The proposed restraining order was also merely prohibitory in form, and counsel for the Commission pointed out to the District Court that the Commission's action would become effective merely by the lapse of time and complete inaction by the Commission; that in order to prevent that result, the Commission would have to take affirmative action to convene and sign a new order countermanding its previous order prior to 12:01 A.M. the following Monday, which would be difficult to accomplish; that the carrier industry and the Government had had 90 days within which to prepare for the effectiveness of the order which the Commission had already entered; and that notice of the countermanding of the Commission's order would have to be given to thousands of carriers in the industry.

Nevertheless, the District Court issued the proposed restraining order, and stated orally that it construed the

order to require the Commission to take affirmative action to abate the effectiveness of the action previously taken by the Commission.

Summary of Complaint.

The 9-page complaint alleged in substance that the United States has established numerous civil and military installations in the State of California that some of these installations are situated on land ceded by the State of California to the United States and are under the exclusive jurisdiction of the United States; that property of the United States moving in intrastate commerce is commingled in the depot system maintained by the United States with property moving in interstate and foreign commerce; that it has been the practice of the United States to negotiate special rates with common carriers for the transportation of its property; that for many years the State of California exempted transportation of property of the United States from the provisions of California law pertaining to the filing of tariffs or approval of rates; that in July, 1955, the Legislature of the State of California amended Section 530 of the Public Utilities Code and deleted therefrom said exemption; that the application of the amended statute would disrupt the established practice of the United States, cause delays in shipments of its property, might jeopardize the security of the United States, and increase the administrative expense of the United States by requiring its officers and officials "to disentangle certain commodities from the mass of commodities in the current of commerce to determine whether or not particular shipments were in fact intrastate"; that such shipments would be "thrown into

the class rate, which as applied to such shipments, is recognized as unrealistically high": that the commodities involved in such shipments are not in competition with those of commercial shippers; that United States transportation officers might find it more economical to ship interstate and that California carriers might be precluded from participating in such traffic; and that the United States might have to relocate its depot system and might thereby cause loss of employment to citizens of California.

For these reasons the complaint alleged that Section 530 of the Public Utilities Code "and related sections" (unspecified) were unconstitutional and void under Article VI, Section 2 of the Constitution of the United States insofar as said sections prohibit carriers within the State of California from transporting property of the United States at rates different from those approved by the Commission in that said sections place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; place an unreasonable burden on interstate commerce; contravene the policy of the Congress implicit in the Federal Property and Administrative Services Act of 1949; and that the penalties provided in said Public Utilities Code are vague and uncertain and repugnant to Amendment XIV of the Constitution of the United States.

The complaint further alleged that the enforcement of said Section 530 of the Public Utilities Code would cause immediate and irreparable injury to the United

States in that the long established practice of the United States in negotiating special rates would "be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission"; the necessity of having rates approved by the Commission "would entail added clerical and administrative work, which would not only be a burdensome interference to the United States in the discharge of its constitutional responsibility, but would likewise add an additional expense"; that "with the disruption of the existing rate structure by the application of the section, undoubtedly many particular shipments would be thrown into the class rate structure. Accordingly, the cost of transporting the property for the United States would be immeasureably increased"; that in the event it should be determined that the State of California had no authority to regulate rates for the transportation of property of the United States, the United States could not be compensated by bond or otherwise for the increased expense which would have resulted to it during the period in which the statute was in force; and that enforcement of Section 530 of the Public Utilities Code might jeopardize the national security.

The complaint requested that a three-judge Court be convened pursuant to Section 2284(1) of Title 28 of the United States Code; that the District Court grant a temporary restraining order and an interlocutory injunction to prevent and prohibit the Commission from enforcing or attempting to enforce said sections of the Public Utilities Code until the complaint was finally heard and

determined; that upon final hearing judgment be entered declaring that insofar as Section 530 of the Public Utilities Code of the State of California and related provisions (unspecified) prohibit carriers within the State from transporting property of the United States at rates other than those approved by the Commission, they are unconstitutional and void, and that the Commission "be permanently enjoined from making any effort to prohibit the carriers within the State from negotiationg and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers." [sic]

Proceedings in the District Court.

The Commission filed in the District Court a motion to dismiss the complaint on the grounds that the District Court had no jurisdiction over the subject matter of the complaint, and that the compliant failed to state a claim upon which relief could be granted. The questions raised by this motion were comprehensively briefed and argued before the District Court. The motion was denied. Thereafter the Commission filed its answer and the case was set for trial on the merits. The trial that followed continued for a week. Twelve witnesses were called by the Government. Virtually all of their testimony was concerned with military traffic of the Armed Forces of the United States. Nine of the witnesses called by the Government were military officers of the Armed Forces, having duties with respect to the procurement of transportation for Government property, and their civilian

assistants. Two other Government witnesses were repr sentatives of railroads. Over objection by counsel for t Commission, these witnesses were allowed to express the opinion that regulation of rates by the Commission woul impede and interfere with the transportation of propert of the United States. As reasons for their conclusio they said in substance that regulation would result i increased cost to the United States; that it would caus delays in shipments of property of the United States that it would impair the military security of the Unite States; that it would be difficult to distinguish betwee interstate and intrastate traffic; that the present syste of procuring transportation for Government property is good system, although attended by certain abuses tha result in depressed rates; and that the very existenc of state power would be onerous.

One of the witnesses called by the Commission was it Director of Transportation. He testified in substance tha he recognized in Section 530 of the Public Utilities Cod a legislative policy to give the United States Governmen preferential treatment; that he would so advise the Com mission; that he saw no reason why special commodity rates could not be established for the United States upo a proper showing; that it could be done expeditiously an without a public hearing; that he saw no reason why regulation of rates by the Commission would cause delay in the movement of military traffic; that the Commissio could authorize rates for Government traffic to be mad effective retroactively, that is, after moves had take place; and that with respect to traffic involving military

security, he would recommend a general order exempting such traffic from regulation.

The Commission's Chief Counsel stipulated on the record that he would officially advise the Commission that it has lawful authority under California law to authorize any carrier to negotiate with the United States with complete freedom concerning the transportation of any property of the United States which may involve security matters if a responsible federal official certified that such transportation involved security; and that the Commission has authority to authorize special rates under Section 530 of the Public Utilities Code without a public hearing and to make such authority effective immediately.

The matter was orally argued on April 19, 1956. Eleven days later, on April 30, 1956, the District Court handed down a 40-page memorandum decision in favor of the Government, wherein the District Court stated its reasons for its ultimate decision as well as for its denial of the Commission's motion to dismiss the complaint. The Government's counsel was directed to prepare proposed findings of fact, conclusions of law, and a form of judgment.

Summary of Findings by District Court.

Fifteen pages of findings were so proposed and adopted by the District Court. In substance, they were that there is a large volume of military traffic in California; that this traffic is different from commercial traffic; that some of it moves from and to installations situated on land ceded by the State of California to the United States; that rate regulation by the Commission would increase

the cost of transportation to the Government, would require additional personnel, and would cause delays in the shipment of Government property; that due to the flow of military materiel through the Government's depot system "it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character"; that it would be necessary to segregate materiel within the various depots and in trucks and rail cars in accordance with its origin or destination, resulting in "delays, increased man hours of work on the part of military personnel, friction and possible litigation"; that regulation of rates by the Commission would jeopardize the security of the United States; that the United States might have to relocate its depot system; that its officers would choose interstate rather than intrastate routes for its traffic to the prejudice of carriers in California; that the foregoing objections to regulation would be multiplied in case of war; that officers of the United States would be subject to criminal prosecution for violations of the Public Utilities Code or regulations of the Commission; and that "the transportation industry in California is in a healthy economic condition."

Conclusions of Law of the District Court.

The conclusions of law proposed by counsel for the Government and adopted by the District Court were in substance that it had jurisdiction over the cause and the parties thereto; that the complaint stated a claim upon which relief could be granted; that the complaint described an actual controversy within the meaning of 28

U.S.C., Section 2201; that "for no valid reason within the police powers or other reserve powers of the State of California, the application of Section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense," and that regulation of rates for the shipment of military materiel would be unconstitutional and void in the absence of any act of Congress; that by Section 22 of the Interstate Commerce Act, 24 Stat. 387 (49 U.S.C. 22); the Armed Services Procurement Act, 41 U.S.C. 151(c) [62 Stat. 21-26], and the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, Sections 201 and 202 [40 U.S.C. 471, 481, 483], Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be free of regulation; that *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, is inapplicable to this case for the reasons that under the regulation involved in the *Penn Dairies* case there would be no direct interference with the officers of the United States in the discharge of their responsibilities, no delays or increased administrative burden or revelation of secret matter in the procurement of the items of supply there involved, and that the regulation of the price of milk by a State is related to the health of the population of the State; that the stipulation of counsel for the Commission that regulation by the Commission will not require the furnishing of secret information and that such regulation will involve a minimum burden on the United States, though made in utmost

good faith, was irrelevant; that insofar as Section 530 of the Public Utilities Code of the State of California purports to authorize the Commission to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers for the transportation of property of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, Section 8, Clauses 11, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; and that if said Section 530 should be applied to the United States, it would suffer irreparable injury, and had no adequate remedy at law.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal involves the preliminary question whether the District Court should have entertained the action and granted injunctive and declaratory relief, and the ultimate question of whether or not the State of California, or any other State, can lawfully regulate the intrastate rates of carriers transporting property of the United States between points in the State. The fundamental constitutional question of the relationship between State and Federal Governments and their respective constitutional powers is involved in both the preliminary and the ultimate questions.

The question of whether a State can lawfully regulate the intrastate rates of carriers for the transportation of property of the United States is one affecting all the 48 States. This question is presently being litigated in the Supreme Court of the State of Texas and in the United States Court of Claims where the laws and regulations

of the State of Kentucky are involved. There are indications that the question has become acute in Georgia, Michigan, Florida and North Carolina.

The provision of the Interstate Commerce Act, viz., Section 22 (49 U.S.C., Sec. 22), which is comparable to Section 530 of the California Public Utilities Code prior to its amendment, and which permits carriers to transport property of the United States in interstate commerce free or at reduced rates, has been the object of sharp criticism in a report, dated December 22, 1955, of the Interstate Commerce Commission to the Interstate and Foreign Commerce Committees of both the Senate and the House of Representatives; in "A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization" (The Weeks Committee) in April 1955; in "A Report to the Congress by the Commission on Organization of the Executive Branch of the Government" (The Hoover Commission) in March 1955; and in a "Report on Transportation Prepared for the Commission on Organization of the Executive Branch of the Government by the Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense" in March 1955. These reports refer to the abuses and evils arising out of the transportation of property of the United States free or at reduced rates pursuant to said Section 22 of the Interstate Commerce Act, and to the widespread dissatisfaction therewith.

After extensive hearings before the Subcommittee on Transportation and Communications, the House Committee on Interstate and Foreign Commerce, on July 3, 1956,

approved the so-called Hinshaw Bill (H.R. 525) which would have amended said Section 22 of the Interstate Commerce Act in such a way as to revoke the privilege of carriers to transport property of the United States in interstate commerce free or at reduced rates.

The Senate had before it S. 1920 which, among other things, would have amended said Section 22 in such a way as to impose certain regulatory restrictions upon the privilege of transporting property of the United States free or at reduced rates.

Both of these bills died with adjournment of the 84th Congress. The controversy surrounding said Section 22 however, is still very much alive, and may well be brought up again before the next Congress.

It would be incongruous if said Section 22 should be amended by the next Congress in such a way as to correct the evils and abuses surrounding interstate transportation of property of the United States, while California and other States were rendered powerless to correct the same kind of evils and abuses in the transportation of such property in intrastate commerce.

The determination of the issues presented by this appeal will materially affect the pecuniary interests of the United States and of all the States which regulate intrastate transportation rates. The District Court found that for the fiscal year 1954-1955, $500,000,000 was expended by the Department of Defense for the transportation of materiel, of which approximately $20,000,000 was expended for the movement of property between points in California.

1. The District Court Should Not Have Entertained the Action

Before the complaint was filed the Department of Defense had been a party to an extended proceeding before the Commission involving the question of regulation of rates for the transportation of property of the United States. *The Department of Defense acquiesced in the Commission's jurisdiction over such rates, and invoked that jurisdiction in its own behalf*, by requesting and obtaining a postponement of a change in the rates applicable to it. The Department of Defense elected not to challenge or seek judicial review of the Commission's action. The United States then changed its mind and sought the aid of a Federal Court. In its complaint nothing whatever was said about the prior proceeding before the Commission or the rate order issued therein, nor was it alleged that the Commission had done, or was about to do, or had threatened to do anything whatever, adverse to the United States. The District Court therefore was wrong when it ruled that the complaint described an actual controversy between the parties to the action. This ruling conflicts with the cases of *Public Service Commission of Utah v. Wycoff Co.* (1952), 344 U.S. 237, and *Public Utilities Commission of California v. United Air Lines, Inc.* (1953), 346 U.S. 402.

The fact is, moreover, that the Commission *had* taken prior action, *and the District Court took cognizance of it by ordering the Commission to countermand it*, which was done. And an administrative remedy for reviewing the Commission's prior action was available to the United States, a remedy by means of which it could have raised

and obtained an ultimate determination of the very same questions it raised in the District Court. The United States failed to exhaust this remedy. It thereafter had no right to relief in a Federal Court. The United States, like anyone else, should be required to exhaust any administrative remedy that may have accrued to it by virtue of its having been a party to a proceeding before an administrative tribunal.

In disposing of this ground for dismissing the complaint, the District Court in its opinion said: "In the instant suit, the plaintiff does not question the propriety of an act of the defendant . . ." *No mention whatever is made in the District Court's findings of fact or conclusions of law, of the prior action of the Commission, or of the fact that the United States obtained a temporary restraining order by questioning the propriety of that action, all of which was in evidence before that Court.* In distinguishing the cases cited by the Commission in support of its argument that the United States had failed to exhaust its administrative remedy, the District Court said "not one [of such cases] dealt with the constitutionality of a State statute." The cases referred to are *Alabama Public Service Comm. v. Southern R. Co.* (1950), 341 U.S. 341; *Myers v. Bethlehem Shipbuilding Corp.* (1937), 303 U.S. 41; *Federal Power Comm. v. Arkansas Power & Light Co.* (1947), 330 U.S. 802, 803; *McCauley v. Waterman S.S. Corp.* (1946), 327 U.S. 540, 543-545; *Endicott Johnson Corp. v. Perkins* (1942), 317 U.S. 501, 507-510; *Rochester Telephone Corp. v. United States* (1939), 307 U.S. 125, 130. The reason given by the District Court does not make these cases inapplicable.

As one of the grounds for its motion to dismiss the complaint, the Commission argued that the Johnson Act (28 U.S.C., Section 1342, Appendix C, p. 1) prohibited the District Court from granting the relief requested by the United States. In its opinion (Appendix A, p. 44), the District Court professes to be "somewhat surprised that learned counsel seriously urges this point, in view of the fact that" the Johnson Act is applicable only in cases where an *order* has been issued by a state agency or other rate-making body. The District Court then disposes of the Commission's argument by stating that "in the instant case, the jurisdiction of this Court is based principally upon the unconstitutionality of a *statute* and not an '*order* . . . made by a state administrative agency or a rate-making body'." (Emphasis by District Court.) Again, the District Court closed its eyes to the fact that a rate order had been issued by the Commission on September 6, 1955, and that all the other requirements of the Johnson Act were fulfilled.

The Commission is not merely surprised, it is deeply disturbed that the United States and the District Court took cognizance of the Commission's order for the purpose of compelling the Commission to countermand it, and then ignored it as a basis for the application of the Johnson Act and of the principle that administrative remedies must be exhausted.

In disposing of the question of whether injunctive relief should be denied, as urged in the Commission's motion to dismiss, the District Court, in its opinion (Appendix A, p. 45), referred to the allegations of the complaint and said "for the purposes of the motion to dismiss, they must

be taken as true." It then said "the single allegation that the enforcement of Section 530 'would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement,' etc., of itself spells out one ground for equitable intervention. We are here dealing not chiefly with considerations of the market place, but with the plea of a constitutional sovereign to be permitted to discharge, without state interference, its duties in connection with its greatest task—the defense of the nation itself."

The quoted allegation, like most of the others in the complaint, is conjectural, vague, and lacking in particularity, and the District Court was wrong in saying that such allegations "must be taken as true." Only facts that are well pleaded are admitted by a motion to dismiss.

The fact is that the United States would not have suffered any injury whatever if injunctive relief had not been granted. In the first place, had it elected to do so, it could have obtained *a stay and judicial review* of the Commission's decision of September 6, 1955 (i.e., Decision No. 51922, Appendix F). But even after it waived this right, there was another way in which the rights of the United States could have been fully protected without the exercise of the drastic injunctive remedy. Common carriers in California, as elsewhere, have a legal duty to accept property and transport it without delay. The United States, through its authorized officers, could at any time demand prompt transportation service from these common carriers. If the District Court had not issued its restraining

order, the minimum rates established by the Commission would have become controlling on December 5, 1955, upon some commercial carriers, and the other carriers would on that date have become bound by their own tariffs. But the United States would have been free to set up in actions at law, by way of defense against the carriers' claims for payment of minimum or tariff charges, the same arguments that it advanced before the District Court, namely, that the United States is not bound to pay minimum or tariff rates established by a State.* Thus, it was possible to avoid any pecuniary damage whatever to the United States, and there would have been nothing for which it would need compensation, by bond or otherwise. On the other hand, California carriers have now forever lost the right to collect minimum or tariff charges for the transportation of property of the Armed Forces since December 5, 1955, a right which they would have had but for the restraining order of the District Court and the action taken by the Commission in compliance therewith.

It is obvious from the foregoing that the equities of the interested parties were unlawfully weighed by the District Court.

The District Court erred further in failing to comply with the principle laid down in a number of cases by the

*At the very time the complaint was filed there was pending in the United States Court of Claims a case in which that Court had decided in the affirmative the very question raised by the complaint, namely, whether a State can lawfully regulate intrastate rates for the transportation of property of the United States. The case is *Hughes Transportation, Inc. v. U. S.* (1954), 121 F. Supp. 212. A motion for further hearing in that case had been allowed when the complaint in the present case was filed.

Supreme Court requiring that Federal Courts abstain from restraining, enjoining or otherwise interfering with action taken by a State in the exercise of its sovereign powers, in order to preserve comity in the relationship between State and Federal Governments. The cases are *Alabama Public Service Comm. v. Southern R. Co.* (1950), 341 U.S. 341; *Public Service Comm. of Utah v. Wycoff Co.* (1952), 344 U.S. 237; and *Public Utilities Comm. of California v. United Air Lines, Inc.* (1953), 346 U.S. 402.

The District Court entertained a complaint that was ill conceived, hastily contrived, and presented by the United States after a capricious change of mind, at the eleventh hour before the effectiveness of Commission action for which the United States had had months to prepare.

The sovereignty of the State of California has been gravely infringed, and the principle of comity between State and Federal Government has been grossly violated by the action of the District Court.

2. The District Court Wrongly Decided the Ultimate Question.

The District Court erred in concluding that the application of Section 530 of the Public Utilities Code, as amended, would "seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense." In reaching this conclusion the District Court, we believe, was unduly swayed by the array of military officers who appeared as witnesses for the Government. It was to be expected that these officers (and their civilian assistants) would be zealous in the performance of their duties, and that they would be dis-

posed to feel that any kind of civilian regulation would be burdensome and offensive. These witnesses should not have been allowed to express opinions upon the ultimate question of whether the application of Section 530 of the Public Utilities Code, as amended, would impede and interfere with the exercise by the United States of its constitutional powers to maintain the military establishment and provide for the national defense. When these witnesses said that in their opinions the application of the statute would have that effect, the District Court accepted these opinions uncritically. When carefully analyzed, however, the evidence showed that the only ill effect of the statute upon the United States would be the possibility of increased cost of transportation. The District Court, however, went so far as to rule that such a statute would be unconstitutional and void "in the absence of any act of Congress" (Conclusion of Law No. VII, Appendix A, pp. 69-70). It then further ruled, erroneously appellant submits, that Congress, in Section 22 of the Interstate Commerce Act (Appendix C, pp. 77-78), the Armed Services Procurement Act (41 U.S.C., Section 151(c), Appendix C, p. 78), and the Federal Property [and] Administrative Services Act of 1949, Sections 201 and 202, 63 Stat. 377 (Appendix C, pp. 78, 79), has expressed a general policy that the procurement of transportation for Government property be free of regulation. Both of these rulings conflict with the case of *Penn Dairies, Inc. v. Milk Control Commission*, (1942), 318 U.S. 261. In this case this Court held that the mere fact that the regulation of a person contracting with the Government imposes an increased economic burden on the Government, does not bring the contractor

within any implied immunity of the Government from State regulation. This case also held that there was nothing in the statutes enacted by Congress governing procurement of goods and services by the military and other agencies of the United States, nor in any of the administrative regulations promulgated thereunder, showing any congressional policy that such procurement should be immune from State regulation.

The District Court, in its opinion and conclusions of law, distinguished the *Penn Dairies* case on numerous grounds, none of which, appellant submits, justified the District Court in refusing to follow that case.

Moreover, there was insufficient evidence to support the District Court's finding that there are frequent shipments of property originating or terminating in installations situated on land ceded by the State of California to the United States.

Finally, the District Court's conclusions with respect to the constitutionality of the California statute conflict with the rules laid down by this Court for determining the constitutionality of a statute, viz., the rule that it will be presumed that the officials charged with the execution of a statue will execute it in a manner not offensive to the Federal Constitution, *National Fertilizer Assn. v. Bradley*, 301 U.S. 178; the rule that of two reasonable conclusions, the one favoring constitutionality must be adopted, *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30; the rule that the Court must assume the existence of any reasonable statement of facts which will sustain the statute, *Alabama State Labor Relations*

Board v. McAdory, 325 U.S. 450, 470, *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185, 486, *Walters v. St. Louis*, 347 U.S. 231, *Gregg v. Frazier*, 253 U.S. 233, 239.

Courts should be slow to strike down legislation of a state "because of its asserted burden upon the Federal Government. For the state is powerless to remove the ill effects of [such] decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275.

In view of the foregoing, Appellant submits that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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(Appendices Follow.)

Appendix "A"

Original
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Apr 30 1956
Clerk, U. S. Dist. Court
San Francisco

The United States District Court
For the Northern District of California

United States of America, Plaintiff, vs. Public Utilities Commission of the State of California, Defendant.	No. 35101

Before Lemmon, Circuit Judge, and Oliver J. Carter and Hamlin, District Judges.

Lemmon, Circuit Judge.

"To git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.

There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.

In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, *infra*, hereinafter referred to as "Sec. 530", is held to

apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the intelligence agents of foreign powers and might jeopardize the security of the United States."

At the trial, the plaintiff put on a parade of witnesses whom we have found to be impressive. Most of them were officers in the Department of Defense, one of them being a brigadier general of the Army. Those witnesses were most emphatic in declaring that the application of Sec. 530 to military freight shipments would be costly and time-consuming, and would have a "chaotic" effect upon the defense activities of the United States.

The defendant, on the other hand, both in its testimony and in a most solemn unilateral stipulation by its chief counsel, *infra*, insisted that it would apply Sec. 530 in a manner that would not impede the plaintiff's defense measures. We may point out in passing, however, that neither the defendant nor its learned chief counsel can bind their successors by even the most impressive testimony or the most solemn "stipulation". But we do not bottom our decision upon this ground.

We are convinced of the complete honesty and good faith of each party to this suit. We believe that the record contains not a single sentence of perjurious testimony. We think that each witness, in the language of the day, "called it as he saw it".

But the crucial question here presented can be resolved by neither the assurance of responsible defense witnesses nor counsel's formal avowal that the statute would be "reasonably" applied to the plaintiff's shipments and the interests of the United States would in no wise be injured. The problem before us is not one of *administrative discretion* but of *Constitutional* power:

May a State statute *empower* a State Commission, however patriotic and well-intentioned that Commission may be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and SUBJECT to sych conditions as IT may consider just and reasonable*"? [Emphasis supplied.]

Reluctant as we are to declare invalid any part of a State statute, we are impelled to hold that, in so far as the plaintiff is concerned, that part of Section 530 which purports to limit the plaintiff's enjoyment of reduced freight rates according to the defendant's pleasure, is in contravention to the Constitution of the United States, as placing an improper restriction upon the plaintiff in the exercise of its sovereign powers related to the national defense.

1. *Statement of the Case.*

On December 2, 1955, the plaintiff filed a complaint in the above-entitled cause, to have this Court declare that certain sections of the California Public Utilities Code, *infra*, are unconstitutional, and to have the California Public Utilities Commission permanently enjoined from taking any action under those sections.

On the same day, Judge CARTER signed an order to show cause and a temporary restraining order, supported by a "Verification and Affidavit" by Captain F. L. Haerlin, USN, together with an order to show cause why an *interlocutory injunction* should not issue during the pendency of the action.

On December 22, 1955, a motion to dismiss the complaint was filed. That motion was denied on February 17, 1956, and by agreement the temporary restraining order was continued in effect in lieu of an interlocutory injunction.

On January 27, 1956, a large group of common carriers filed a motion to intervene as defendants. That motion was denied, "without prejudice to the right of the applicants in intervention to appear amicus curiae in further proceedings in this case."

On February 3, 1956, the California Manufacturers Association filed a motion to appear as amicus curiae. That motion was granted.

On February 6, 1956 Major Generals Paul F. Yount and John P. Doyle, of the United States Army and the Department of the Air Force, respectively, filed affidavits to the effect that the allegations of the complaint are true, to the best of their information and belief. They are the transportation heads of their respective branches of the armed forces.

The defendant filed its answer on February 27, 1956.

2. *The Complaint.*

The plaintiff alleges that in July, 1955, the California Legislature amended Sec. 530 of the Public Utilities Code

and deleted therefrom "the express exemption from the general provisions of the Code of Shipments of property" of the plaintiff. California Stat. 1955, Ch. 1966. This amendment likewise expressly provided that carriers could grant reduced rates to the plaintiff only with the permission and under conditions determined by the defendant.

It is averred that in so far as Sec. 530 and related sections of the Public Utilities Code prohibit carriers from shipping property for the United States at rates different from those approved by the defendant, they are void under Article VI, Sec. 2 of the Constitution of the United States, in that:

1. For no valid reason within the police powers or other reserved powers of the State, they place an unreasonable burden and impediment on the United States in the discharge of its Constitutional powers and responsibilities.

2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of Congress, under the Constitution.

3. They contravene the policy of Congress implicit in the Federal Property and Administrative Services Act of 1949, relating to the negotiation for the transportation of property for the plaintiff, and enacted pursuant to the power conferred upon Congress by the Constitution.

4. Insofar as the Public Utilities Code of the State imposes penalties upon common carriers for failure to ship property for the plaintiff at rates other than those approved by the defendant, it is repugnant to Amendment XIV of the Constitution, in that it is vague and uncertain because it imposes upon carriers the duty of resolving

intricate questions of law and fact in determining what particular shipments of persons or property may be in intrastate or in interstate commerce.

Wherefore it is prayed that, on final hearing, judgment be entered declaring that insofar as Section 530 "and related provisions prohibit carriers within the State from shipping property" of the plaintiff "at rates other than those approved by the defendant, it [sic] is unconstitutional and void"; and that the defendant be permanently enjoined from making any effort to prohibit carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the plaintiff at rates and charges other than those determined by such contracts and arrangements between the plaintiff and the carriers.

3. *The Motion to Dismiss.*

The motion to dismiss and its supporting brief set forth that:

1. The Court lacks jurisdiction over the subject matter of the complaint, because:

(a) The complaint does not allege an "actual controversy" within the meaning of 28 USCA Sec. 2201; and the plaintiff therefore is not entitled to a declaratory judgment.

(b) The plaintiff has failed to exhaust the administrative remedy available to it in a proceeding before the defendant.

(c) The complaint involves a matter within the primary jurisdiction of the defendant as an administrative agency of the State.

(d) This Court is prohibited by the Johnson Act, 28 USCA Sec. 1342, from granting the relief requested by the plaintiff. The Johnson Act is as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "(2) The order does not interfere with interstate commerce; and,
>
> "(3) The order has been made after reasonable notice and hearing; and,
>
> "(4) A plain, speedy and efficient remedy may be had in the courts of such State."

(e) The plaintiff will not suffer irreparable injury in the absence of injunctive relief by this Court, but has an adequate remedy elsewhere. On the contrary, persons other than the plaintiff have suffered, and will continue to suffer, irreparable injury as a result of this Court's granting the plaintiff's request for injunctive relief. "'. . . the Commission, in compliance with this Court's restraining order, indefinitely suspended the cancellation of a provision in Minimum Rate Tariff No. 2, and thereby continued, for an indefinite period of time, the opportunity for some carriers to hold rates at a 'depressed and unreasonably low level'."

(f) The Court is required by law to abstain from granting the relief requested by the complaint in order to

preserve comity in the relationship between the plaintiff and the State of California.

(g) The subject matter of the complaint is within the exclusive jurisdiction of the State.

2. The complaint fails to state a claim upon which relief can be granted. In addition to the "deficiencies" already pointed out, there are additional defects: "Most of the allegations of the complaint are not well pleaded for one reason or another. They are either vague, or ambiguous, or conjectural, or irrelevant, or conclusions rather than specific allegations of fact. . . . the only things left are allegations that the California Legislature amended Section 530 of the Public Utilities Code, and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. . . . [These two allegations] do not furnish any basis for relief by this Court."

4. *The Plaintiff's Position.*

The plaintiff's brief was filed after that of the defendant, and is partly in answer thereto. Its main points are stated in its complaint, which is, to a certain extent, argumentative and contains considerable background material.

In addition, the brief asserts:

I. The Court has jurisdiction over this action, because the "gravamen of the plaintiff's case lies in its assertion that from the nature of the rate regulating process any subjection of it to the process will directly and drastically interfere with its constitutional responsibilities, principally that of supplying the armed services."

II. The plaintiff's lines of supply are such that any local interference with them is a matter of national concern.

III. Any state statute that places an unreasonable burden or impediment on the discharge of a federal function is unconstitutional. The local interest involved must be balanced against the national interest with which the statute interferes.

IV. The defendant's regulation of rates for carrying the plaintiff's property would seriously interfere with the lines of supply and place a great burden on the officers of the United States charged with responsibilities in the supply function.

V. The defendant's regulation of rates for carrying the plaintiff's property would not benefit the citizens of California in any way whatsoever. The contrary would be true.

VI. Many shipments that appear to be *intrastate* are in fact *interstate* because they are in the stream of interstate commerce or are shipped to or from places over which the plaintiff has exclusive jurisdiction. Any effort to apply Sec. 530 in such situations would result in confusion, friction, and needless litigation.

VII. Pursuant to its Constitutional powers, Congress has clearly expressed the policy that all shipments for the plaintiff shall be made by special arrangements, and Sec. 530 as amended is directly contrary to this policy.

5. *Section 530, as Amended.*

On July 12, 1955, Sec. 530 of the Public Utilities Code of California was amended to read as follows:

"Every common carrier . . . may transport, free or at reduced rates: (a) *Persons* for the United States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes . . . The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable.* Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers.* . . ." [California Stat. 1955, c. 1966.] [Emphasis supplied.]

Before the amendment, the first sentence of Sec. 530 read in pertinent part as follows:

"Every common carrier subject to the provisions of this part may transport, free or at reduced rates:

"Persons OR PROPERTY for the United States," etc.

The deletion of the two emphasized words has given rise to the present controversy.

6. *The Testimony.*

The first and principal witness for the plaintiff was Brigadier General Edmond C. E. Lasher, Assistant Chief of Transportation of the Army for Traffic, who represented the Department of Defense in his testimony. Although fourteen witnesses testified at the five-day trial,

General Lasher's testimony, covering more than one hundred pages, takes up nearly one-fifth of the 552-page transcript.

General Lasher was an intelligent, forthright, and impressive witness. He told the Court that "The policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

"This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved."

(a) *The "Pattern of Traffic".*

A trifoliate standard is observed by the plaintiff in choosing "the modes of transportation for the armed services", General Lasher explained:

> "The first requirement, of course, in all our transportation is to select that carrier within that mode which best accomplishes the requirements of the particular traffic involved. The needs of the government are, of course, paramount. Secondarily, the question of cost is involved; and thirdly, the division of traffic amongst the carriers who are able to carry it."

There are "many, many points of difference between commercial requirements . . . and military requirements for transportation", and commodities in military traffic

"are never in competition" with commodities in commercial traffic, the general said.

"As a matter of fact," he added, "oftentimes they are moving opposite to the flow of commercial or industrial traffic."

The "pattern of traffic" for the plaintiff generally "must follow the flow of requirements" and *cannot be fixed by State boundaries*, General Lasher emphasized.

(b) *Commodity versus Class Rates.*

The Army transportation expert explained the rate-making procedures for the transportation of government materiel in the plaintiff's depot system.

"Our goods move generally on tariffs," General Lasher stated, "but as we find penalty class rates applying to our traffic, we ask the carriers to sit down and negotiate with us. That is done on a direct basis with the carriers under the provisions of . . . Section 22 of the Act to regulate interstate commerce.[1] The rate and arrangements finally agreed upon, or finally proffered, I will say, by the carrier or carriers is a rate voluntarily given and a rate which, in most cases, we believe is a rate that carrier can move the traffic for and still make a profit on his business."

The outgrowth of *commodity* rates from *class* rates was then traced by the general.

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[1]The opening words of that lengthy section are: "Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States," etc. (49 USCA Sec. 22.)

"Well, it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

(c) *Spark Plugs, Doughnuts, and a Korean Bottleneck.*

After describing at some length the "depot system" of the Army in particular and the Department of Defense in general, the military transportation expert illustrated the

need of speed in supplying the needs of the armed services, by graphically describing a "bottleneck" involving the lowly spark plug.

"There is no substitute for a part, for an item, if you don't have it," General Lasher said. "And I would like to stress the importance of making this system work.

"Among other of my duties I was transportation officer of the Eighth Army, during the first year in Korea, and we had a lot of truck companies over there, a lot of trucks. The length of Korea was such that we had to use a great deal of transport, and particularly as we raced north to the Yalu River. * * *

"The sad part of it was that we had many trucks deadlined, out of commission for lack of parts; and [of] three of the ordinary items [of] which we were in shortest supply, one was spark plugs, one was spring leads, and one was sealed beam headlights—items which I knew were coming off the production [lines] in the United States like doughnuts. Spark plugs tumbling off! I could see them! *We couldn't get a spark plug.* Not because there weren't spark plugs available, but because the logistics system wasn't working for one reason or another.

"Nothing must be placed as an impediment to the complete flexibility and flow of movement of supplies to our troops in foreign theaters, whether it's in peace or in war."

(d) "*We Would Never Win the War!*"

In reply to a question regarding the effect that State regulation of rates for intrastate shipments of the plain-

tiff's materiel "would have on the supply lines and logistical system of the United States," General Lasher said:

> "If we were . . . forced to go to State regulatory bodies in order to arrange for the movement of our traffic and the rates upon which it moves, we would find ourselves in a time-consuming job of spreading before the public the requirements of the military.
>
> "First of all, let me say that it is only until recently that I have had to take into consideration whether certain of our traffic was or was not interstate, and in attempting to prepare myself somewhat, I tried to read some law and I was—I found out that I was terribly confused, that it would be very difficult for me to distinguish in most cases, for we do not know when an item starts out on its journey from the processor whether it is going to be consumed in North Dakota or Florida or Cambodia.
>
> "Now, one of our difficulties right away would be for the clerks in our thousands of post camps, stations and bases throughout the United States, our clerks to determine whether this item was intra- or interstate. It apparently is a rather moot question at law, let alone at the administrative level of a clerk earning $3500 or $4000 a year.
>
> "Now, then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way, *we would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible.*

"We haven't touched on the security yet, but security is of primary importance to us. . . . Were we to spread . . . the record of the characteristics of our freight before the public and the parties at interest, we would seriously jeopardize that security, and in some cases be in violation of the law."

(e) *The Security Problem.*

Expatiating upon the security phase of the problem, General Lasher continued:

"There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The general added that State regulation of rates would tend to increase the freight bill of the Federal Government:

"Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

In 1955, "a peacetime year, rather quiet year," the Department of Defense spent about a half billion dollars.

In "a typical wartime year", the expenditure was "four to five billion dollars", the General stated.

If the various States regulated the rates for the intrastate shipment of military materiel, the Department of Defense would have "to increase our force many times, in my opinion", General Lasher declared.

"Maybe not 48 times," he explained, "but we would have to be ready to concurrently handle with several of the State regulatory bodies concurrently at the same time. So that we would have to have a multiplicity of groups, if you will, so that they could be handling concurrently so as not to delay things any more than necessary."

Finally, the entire depot system of the plaintiff would probably have to be rearranged, General Lasher asserted.

"Our depots are now set, upon the present system, whereby we can with facility make arrangements according to it. If we have 48 different jurisdictions, the pattern of our traffic will necessarily change because of the 48 different ideas as to how our traffic should . . . flow, and depending upon the pattern which falls [flows?] out from those various jurisdictions, we would then have to adjust our logistics system to comply with the new circumstances rather than the circumstances with which we find ourselves confronted now."

(f) *The Power Is the Threat.*

On cross-examination, General Lasher conceded that the defendant "or any other state commission, for that matter, would be most receptive to any representations we of the military might have before such hearings."

"But," he added, "the mere fact that we would have to make such representations is to me the crux of this. Again I go back to my original testimony wherein I stated that the mere fact that we have to spread the record with things which we might not want to spread the record with is inimical to our best interests."

Emphasizing that the plaintiff is "alarmed" not by the defendant's administration of the power given to it by Sec. 530, but by *the existence of the power itself*, the General testified:

> "However magnanimous the Commission itself might be, or at any one time, depending upon its makeup, or however uncompromising it may be, depending upon some other makeup, what we view with alarm is an obvious intent to further regulate our logistic system by regulating the traffic which moves for it."

The witness conceded that he had "no reason to think that the Commission will not act reasonably".

The plaintiff's transportation expert also conceded that, although the present system is "good", there have been some few "abuses" under Sec. 22. In enlarging upon this statement, General Lasher testified:

> "Individual carriers wi" at times, in order to capture traffic which they might otherwise not have, quote for the Government under the umbrella of Section 22, rates far below the going rate in order to get a small piece of business. This abuse is very difficult to eradicate. However, the number of carriers by any mode of transportation who resort to that practice are, in the total number of carriers involved, very, very few."

The General added that he would advocate one change in the Interstate Commerce Act, namely:

> "A wording . . . to allow of such administrative procedures as would prevent the abuses which I mentioned a while ago. I said we were constrained to accept a low rate. We are constrained to do so because if we do not, then in the opinion of some people we are squandering the taxpayer's money. We do not want to be placed in that position. Therefore, if administratively we could have the authority and the Comptroller General of the United States also had the mandate from Congress, we could so administer Sec. 22 as to prevent these very abuses."

(g) *The Problem of Segregation.*

Lieutenant Colonel George A. Hall, Chief of the Transportation Division of Sharpe General Depot at Lathrop, California, testified that the Depot was carrying 61,800 "line" items a few days before he appeared in court. That figure did not include items used in repair and maintenance, "nor the items themselves that are in maintenance, such as bulldozers and locomotives and that sort of thing". The Depot ships primarily to points in the West Coast, in the Sixth Army area, embracing eight Western States. The turnover at the Depot is approximately 15,000 tons per month at the present time, "in and out".

The transportation expert testified that the Depot has "interstate and intrastate materiel so commingled that we could not possibly segregate it". He added that if the defendant assumed jurisdiction over the regulation of rates on the shipments from Sharpe, it would "just be impossible at the present time" to determine what mate-

riel was in fact interstate and what was intrastate, in so far as the regulations were concerned.

In addition to supplying the armed services, the Sharpe Depot stores strategic materials, and also serves "as a source of supply" in disaster relief.

"One normally thinks of the Army in connection with a military disaster," Colonel Hall said. "Actually, that is not entirely correct. Take the recent flood. We are prepared, ready to go to work in case of any *civilian* disaster.

"During the flood we shipped approximately 225 truckloads of either flood relief material or equipment to fight the flood. . . . At the present time . . . the sources of danger in the area are considered, number one, earthquake; second, fire; third, flood; fourth, enemy action. We are prepared to go on 24-hour duty in the event of any disaster."

Colonel Hall remarked that there are a number of movements which are so urgent and to such out-of-the-places [sic] that there is no appropriate rate structure for them.

(h) *A "Completely Chaotic" Situation.*

Replying to a question regarding what would happen at Sharpe if the restraining order in this case, *supra*, were lifted, "and the statute as you understand it went into effect" Colonel Hall testified:

> "Well, I can't imagine operating under such circumstances. *The situation in my office would be COMPLETELY CHAOTIC!* * * * We would have a lot of additional rating to do other than the physical

handling, as I see it. I only have one rate clerk in my office, who is rating comparatively few shipments now. As I see it, he would be rating a good many under the circumstances described. * * * If we did try to consolidate it all, we would have to try to consolidate according to the freight classification rather than the present broad description that we are now able to operate under. . . . It would be a considerable burden upon my office. I would guess that it would increase our costs of billing—I am talking of the billing alone, the accomplishment of the paper work—some 40 per cent. It costs us $1.71 at Sharpe to issue each bill of lading. That is just the paper work of having a bill of lading prepared. The more complicated it becomes and the more bills of lading . . . that we issue, obviously that cost is going to go up. Of course, it would result in additional costs out on the shipping floor. * * * the increase in paper work would go all the way up the line. There are more pieces of paper, more bills of lading, more shipping documents, and all the way up to finance and general accounting office, there would be additional paper work as a result."

Another difficulty would arise in the negotiation of rates, Colonel Hall stated.

"I do not know just how it is contemplated that we will negotiate for rates. When I say 'we' I mean the Department of the Army as a whole, how we would negotiate for rates. I would assume that it would require a series of officers in various localities to appear before the various state regulatory bodies. Of course, it would seem to me that they would impose a considerable burden upon the installations themselves asking for supporting data and testimony.

I am not very well equipped at my place. We are strictly an operations office, not a statistical office, and I could not spare the time at the moment for too much of that."

(i) *The Spy's Jigsaw Puzzle.*

On the subject of required secrecy in certain cases, Colonel Hall stated that "really over a period of time *every military shipment is in a sense a security shipment.*"

"I had some experience in Europe in that situation," the Lieutenant Colonel explained. "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments—shoes, medical supplies and food. Actually, a month's record of shipments to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purposes in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

On cross-examination, the transportation expert said that he did not know whether the defendant would require the publication of all the records of carriers transporting secret Governmental material.

"They *could*, under the circumstances, I would say," the officer remarked.

Regulation by the defendant as contemplated by the statute in question would interfere in certain Governmental shipments to the following extent, Colonel Hall testified:

> ". . . now the office of Chief of Transportation can go direct to a competent carrier, or group of carriers, and explain the situation and whatever dealings are made are done very rapidly and easily, direct with the carriers. As I see it, in such a case as this, we would be going through the State Commission and we would not, in such case, necessarily deal directly with the carrier."

Lieutenant Colonel Andrew Paul Flanagan, Transportation Corps, Regular Army, stationed at Washington, D.C., testified that he is "charged with the responsibility for negotiating rates with commercial carriers, nationwide, for the movement of Department of Army freight". He stated that the regulation of rates by State Commissions for the movement of Government properties would interfere and impede him in the discharge of his responsibilities.

"If this situation should spread to other States," he continued, "we would be faced, in my opinion, with an intolerable situation. We would be deprived of the flexibility and the expeditious methods we now have of establishing rates on army military traffic."

(j) *"The Need to Know"*.

Colonel Flanagan discussed the "need-to-know" basis of security information, the principle of which had already been explained by General Lasher.

"In the case of where the carrier has a representative with a carrier's security clearance, I will tell that individual, not everything about the shipment, but all that he needs to know. We must realize that this classification, if a man is cleared for top secret, you do not have to tell him everything. It is on a need-to-know basis. You tell him only what he needs to know. I tell him sufficient information about that traffic so he knows that what we are asking for is just and reasonable, and he is satisfied, and this is the only man that I have to convince—no one else."

Giving only "the skeleton facts" of a certain secret movement, *which was still taking place at the time he was testifying*, Colonel Flanagan told how his office and the carrier established a rate that represented a saving of about $500,000 as compared with the "class rate".

"We would have been faced on this movement [with] classification by analogy, which would have thrown us into a very high class-rate structure. There are also certain arrangements to be made—emergency arrangements and airplane—[we?] discuss this matter with the freight traffic manager of the carrier concerned.

"Incidentally, he did not know anything outside the origin and destination. He didn't know what the actual commodity was and I couldn't tell him what the actual commodity was.

"The shipment is moving in substantial volume, trainload lots. The difference between the two rates, you might say, the class rate structure and the rate we established, which incidentally gave the carrier a revenue of over $2.00 a car a mile on the rate we did establish, *was approximately a half a million dollars on that move.*"

The Colonel also testified regarding a similar saving of $73,000 on a small-arms and ammunition shipment from Belmont, Arizona, to an air field in Utah.

(k) *Wasting Time by the Truckload.*

Lieutenant Commander Gordon W. Bengtson, Supply Corps, United States Navy, is in charge of the Navy Central Freight Control Office at the Naval Supply Center, at Oakland, California, which carries "hundreds of thousands" of items.

Commander Bengtson thus enumerated the various burdens that the application of Sec. 530, as amended, would place upon his office:

> "We would be required to ship under the rates established under the PUC minimum. . . . We would be required to classify every item in the shipment. . . . A shipping activity went through the process of completely classifying a shipment, a 40,000 pound truckload shipment, and approximately 13 hours were expended, 13 man hours were expended in complete classification of all the items in this truckload shipment."

The naval officer expressed the opinion that a delay of that sort might be crucial for operational purposes in the Navy. He said:

> "If we were required to meet a deadline to ship material to ships operating where it would be required we ship on very short notice, those additional hours required to completely classify the shipment might result in a delay in meeting that deadline."

Commander Bengtson commented that such a delay might result in the ship's leaving port without the item on

board," or, if the item was important enough, it might result in the ship's not sailing.

If "this new rate structure" went into effect, the personnel in his organization would have to be increased "approximately 50 per cent", Commander Bengtson said. The 13 additional hours required to classify completely the shipment "represents labor costs, and the 13 additional man hours would be approximately $25 a truckload." Bills that his office has already studied, "just through our main channels of traffic, reflect increases [in rates] up to 45 per cent".

Under Navy regulations, the nature, the direction, weight, etc., of shipments of security material for purposes of rate-making could not be revealed, Commander Bengtson said.

On cross-examination, the commander testified that "Where there is any doubt as to the interstate or intrastate nature of a shipment, we utilize carriers that have both operating rights, interstate and intrastate."

(1) *Speed Is of the Essence.*

Colonel Herbert C. Chambers, commanding officer of the Air Force district traffic office at Mira Loma, California—an "office . . . composed of technicians"—expressed the view that State regulation of intrastate shipments of Air Force material between points in California would "definitely" interfere with his mission at Mira Loma.

"I say 'definitely'," he explained, "because we—our logistics system is based on *speed* and we cannot tolerate anything that would interfere with speed. And, as I have

pointed out previously, this Air Force mission is world-wide, and I think every one recognizes the importance that Strategic Air Command has played in present world affairs."

Referring to "security-type shipments", Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers [number?] of missiles that are involved or the points of origin and destination. We would certainly not . . . want to do it, and we would conceal that in so far as possible."

(m) "*Would Hamper and Hinder*".

Lieutenant Colonel Walter H. Eastham, United States Marine Corps, officer in charge, Marine Corps Fleet Control Office, San Francisco, California, testified that the imposition of the minimum rate classification—the defendant's regulation of rates—would severely hamper and hinder him in carrying out his duties.

"To begin with," he asserted, "it would require a slow-down in our movement of freight. It would cause . . . that the classification would be required. Since our traffic is very unique and different, we have to ship many thousands of different items and in many different directions, and itemwise our IBM stock records indicate that we have approximately 450,000 items in our stock system, control system, that is used to ship to the various activities.

". . . the commodities are very difficult to be continually classified under one group . . . , they are all different, there is an admixture. If we have an emergency shipment it would require us to pay, in my opinion, a higher

charge, and all in all I just think it would cause us considerable inconvenience all the way through."

Colonel Eastham added that the defendant's regulation of rates for the shipment of Marine Corps materiel would increase that service's "freight bill", and that such State regulation would "definitely" interfere with the shipments of secret material "in so far as the classification of equipment, or a requirement for going before the Commission and explaining the type of equipment" is concerned.

There would be difficulty in distinguishing between interstate and intrastate materiel, the Marine Corps officer added.

"However," he continued, "it is our policy that where there is any question as to whether it is interstate or intrastate, we attempt to get carriers that have both rights, even though the charge is greater."

(n) *A Civilian Expert's Viewpoint.*

So far we have considered the testimony of official spokesmen representing the Army, the Navy, the Air Force, and the Marine Corps. It may be helpful now to examine the viewpoint of a representative of the Western railroads, who expedites the handling of freight rate matters for the plaintiff.

We refer to Leonard Hill, of Washington, D.C., who testified that he has been employed "in various capacities by the western railroads for the past 39 years, and [that] most of those years were spent in handling the matter of freight rates for commercial shippers and for the Government."

Mr. Hill agreed with other Government witnesses that "the regulation of rates for the shipment of Government property by State Commissions" would seriously interfere with the plaintiff in the discharge of its responsibilities of supplying the armed services. He also expressed the view that the present system of rate adjustment for the plaintiff is a good one.

"And I would like to add this, if it please the Court", Mr. Hill continued, "The railroads of the United States have had a good deal of experience in the handling of Government freight, and it's a matter of record during World War II 97 percent of the military traffic of the United States moved by rail.

"The present system is based on experience with it, and it fits the needs of the traffic and the needs of the traffic are directly involved with the national defense."

Several other witnesses, both military and civilian, testified on behalf of the plaintiff, but we believe that the individuals quoted above supplied evidence that amply supported the Government position.

(o) *The Case for the Defendant.*

The first of the defendant's three witnesses was Tal Loretz, a self-employed traffic and transportation consultant, familiar "in a general way" with transportation rates in California.

Mr. Loretz testified that there was "need for some interdependence and some type of regulation, if you please, on Government traffic, because it is only a part of the overall traffic movement."

The witness explained that the freight-all-kinds ("f.a.k.") rates in California "have been generally subject to a 20,000 pound load that would be subject to one level of rate, a 30,000 pound load or shipment would be subject to a somewhat lower basis, and either a 36,000 or 40,000 pound load or shipment, which is normally the highest for a truckload movement, is accorded a still lower rate."

Much of Mr. Loretz's testimony was highly technical, being given in part in connection with exhibits showing freight rates and their adjustments in California since 1952.

(p) *"Throwing the Book Out the Window".*

Mr. Loretz expressed himself as opposed to "f.a.k." "as applied to various kinds of moves".

"When you establish a freight-all-kinds rate, you in effect throw the book out the window," he declared. "You say that regardless of whether it's a steel billet or steel bar, on the one hand, or it's a mattress or an airplane wing or something, on the other, that we move them both at the same rate. . . .

"So the carriers have attempted at different times to set up some protection to themselves whereby, whether it be a steel beam or a mattress, why, they could be assured of a certain amount of minimum revenue per loaded mile.

"That is one phase. I have dwelt on that at some length because that is one phase of the deterioration of the California Government- ate structure which cannot be expressed just in figures. . . . my opinion is that the

same rate applicable to the steel beam and the bulky airplane wing is, on its face, *wrong.*"

It is this inequity, Mr. Loretz continued, that makes it necessary "that there should be some regulatory agency which could determine if and when there may be some special conditions to justify freight-all-kinds rates, and if there is any reason for them, to tie them down appropriately so as to avoid a burden being placed on other traffic which the carrier has to move, not only for the Government but for the public at large." He added that the f.a.k. rate has been abused in California.

"I can conceive from the military standpoint," Mr. Loretz explained, "we will say, if an entire division is being moved from one location to another, it might be expedient for both the shipper and the military, as well as the carrier, to just have one rate on military impedimenta, and to take the good with the bad and average it out, so to speak, as any contractor might do in any other field.

"But I would like to point out particularly that your freight-all-kinds rate, as they [sic] have been in effect in California for the past several years, they go 'way beyond that purpose. *They apply on the whole load of steel bars or they apply on a load of mattresses.*

"It isn't a question of balancing your load between the two and avoiding a minute description of the entire shipment. It's a question of a rate which, if it's a good rate for one, it is obviously a bad rate for the other article, all of which is included within that broad description."

(q) *"Only an Impartial Regulatory Body Can Resolve It.'*

By way of summary of this part of his testimony, the traffic expert asserted that freight-all-kinds rates "certainly should be scrutinized most carefully, and I don't know of any one other than an impartial regulatory body that can resolve the problems that have developed here in California through the use and abuse of freight-all-kinds rates."

On cross-examination, Mr. Loretz was asked whether, "in controversial cases, . . . where the normal channels of due process were followed, . . . it would be possible to get a decision out of the [defendant] in less than 30 days". He replied:

> "As to commercial traffic, I would say that 30 days is probably pretty conservative. As to what the Commission might do on military traffic, as you have stated, if there are unusual conditions there, I couldn't say. I am sure they will find the means of meeting that situation, though.
>
> "Q. But so far as you know now, no such rules have been promulgated or proposed?
>
> "A. There are none in effect on commercial traffic."

And on that muted note, Mr. Loretz's testimony ended.

Robert A. Lane, senior rate expert in the defendant's Transportation Department, was the next witness. Much of his testimony was in connection with a three-page typewritten document prepared under his direction by J. P. Haynes, Publishing Agent for all rails in California, and entitled "Pacific South Coast Freight Bureau Tariff No.

300, Cal. P.U.C. No. 102", etc. The exhibit was designed to show commodity rates between principal California shipping points, and covered items ranging from cable to canned goods, and from soap to sinks. Even at that, however, Mr. Lane testified that "these are a very, very small portion of the commodity rates in California. There are literally thousands of them."

Soap is a "heavy-moving commodity", Mr. Lane believed, and he included it in his list also because "certainly it is a commodity the military uses, and I wanted to show that we have commodity rates for commercial business for a general commodity such as that."

"One of the further purposes of this exhibit," Mr. Lane testified, is to combat the alleged inference that "there were no commodity rates in California available for the movement of traffic."

"The class rates, yes, they move c.l. traffic and carload traffic," Mr. Lane conceded, "but I think volumewise the class rates move only about a third of the traffic weightwise."

(r) *The "Piggyback" Plan.*

The witness told of the "piggyback" system—"a movement of the rail traffic in a trailer, an automotive vehicle trailer of a subsidiary of the rail carrier."

"The vehicle body, the trailer," he explained, "picks up the shipment, is loaded in there with use generally of the driver, and it is hauled to a rail yard where it is loaded on a flat car. . . . The trailers on flat cars are hauled over the rail lines to the terminal area, and in the terminal

area they are unloaded and delivery is made from the trailer."

Mr. Lane stated that under California law motor vehicle carriers are at liberty to charge the rates that appeared in the rail tariff shown in his exhibit.

James W. Mulgrew, Director of the Transportation Division of the defendant, was the final witness. After reviewing the history of regulation of transportation in California since 1911, Mr. Mulgrew stated that for many years certificated carriers in California had the "unqualified right" to charge reduced rates for the plaintiff. This applied to "fixed terminal carriers and to the railroads," but not to "the highway contract or radial highway common carriers, who had no such right."

The defendant's transportation chief stated that he knew of no reason why commodity rates for the movement of Government traffic could not be granted "with the proper showing". He added that he saw "no reason" why regulation by the defendant "should necessarily cause delays".

(s) *"Rates Could Be Made Effective Retroactively"*.

"In view particularly of the fact that there is no competition that I know of between the Government and individual shippers at all likely, I should think that the rates could be made effective retroactively much as they are done—much as they are made under the present system.

. . .

"Now, the second point that I have, on delays, is the difficulty of classification of commodities where large numbers of different items are included in a lot. If I followed

the testimony of the Government witnesses correctly, it seems to me that that rests on a misconception. It's not necessary under our system of rates that the particular freight for a particular truck be segregated and rated as one shipment. You can make the tender of the entire lot, whether it be one truckload, ten truckloads, or a hundred truckloads, as one shipment, and the lowest truckload rates will apply to the entire string of trucks, regardless of how the category may be stowed in particular trucks.

"So . . . if I followed the testimony correctly, I don't see that there should be any delay attributable to rating, . . ."

On the subject of security, Mr. Mulgrew testified that the only thing that he could see to do "is to exempt that by some sort of a general order of the Commission, exempting the traffic from minimum rates or any sort of rate establishment upon certification by a competent military authority that this is restricted traffic, or secret traffic." He added that he would be prepared to recommend that sort of an order to the defendant.

(t) *Unregulated Rate Making "Creates the Opportunity for Abuses".*

Mr. Mulgrew testified that letting carriers be free to quote rates to the plaintiff "creates the opportunity for abuses that would not be present if there were some *screening*, shall we say, of the Government rates." The witness referred to General Lasher's reference to that as an "abuse", and added:

"The danger, as I see it, is that * * * if rates get below cost, any rates, Governmental rates or com-

mercial rates, the carriers can't long survive, or they will have to offset the unremunerative traffic with higher than necessary rates on other traffic.

"There is a situation here, I think it is peculiar to California, where the carrier making the contract with the shipper in turn hires some other carrier to do the actual hauling. That transaction between the two carriers is not regulated ratewise except in the case of dump truck traffic, and so these carriers, called independent subcontractor haulers, may take freight at less than remunerative rates in order, as one witness said, to get 'gas money'. . . . There are some 15,000 of these permit carriers, many of them driver-owner operators."

The witness added that Sec. 530, as amended, does not require public hearings, and that it will be possible for the defendant to set up certain procedures for expediting requests by carriers or by the plaintiff itself with respect to the plaintiff's traffic.

"We have emergency situations that arise in commercial traffic and they are taken case of," Mr. Mulgrew commented.

On cross-examination, counsel for the plaintiff read from the defendant's "excellent report for the year 1954-1955" showing that the trucking industry for that fiscal year had a gross revenue of $550,730,134, "an all-time high".

Regardless of what might be happening in particular instances in the Government traffic, Mr. Mulgrew agreed that the trucking industry in California "as a whole is one that is sound," adding:

"I think we have a very adequate transportation system and in reasonably good financial health."

Counsel for the plaintiff introduced the defendant's report, saying:

> "In a Constitutional question of this sort we balance the needs of the State regulation and balance against that the harm that would actually be done to the Federal Government in the carrying on of its Constitutional responsibilities on a national scale, and for that reason it seems to be very pertinent to know whether the situation here in California as a whole demands any drastic action at this time."

Of the 15,500 trucking companies in California that are authorized to carry Government traffic, about 500 are certificated—"common carriérs in the sense that they must serve all who tender them traffic within the limit of their common carrier undertaking", Mr. Mulgrew stated.

(u) *Defense Counsel Stipulates.*

Immediately before both parties rested, Judge Everett C. McKeage, chief counsel for the defendant made the following unilateral stipulation:

> "I will stipulate that I will officially advise the Public Utilities Commission that it has lawful authority pursuant to Sec. 530 . . . and other provisions of [the Public Utilities] Code, to authorize any carrier to negotiate with the United States with complete freedom concerning the transportation of any property of the United States which may involve security matters, provided only that the carrier require a certificate from a responsible Federal official, which certificate shall be filed with the Commission, that such transportation involves security matters; and in my opinion, such advice will be accepted by the Commission and acted upon.

> "I further stipulate that I will officially advise the . . . Commission that it has authority pursuant to Sec. 530 . . . and other provisions of said Code to grant any and all lawful authority requested under said section of said Code without the necessity of a public hearing, and grant such authority effective immediately, and that such advice will be accepted and acted upon."

Judge McKeage then cited some law to the effect that the Commission "may make its orders effective immediately," and repeated that he would so advise the defendant, "and in my opinion they will accept and act upon" such advice.

7. *This Court Has Jurisdiction Over the Subject Matter of the Complaint.*

In a 54-page brief, with voluminous appendixes, the defendant argues that this Court should sustain the motion to dismiss. It would unduly lengthen an already lengthy opinion to discuss in detail the defendant's many contentions, some of which overlap. We have carefully considered each point, and will review the principal ones briefly.

The first major attack upon the complaint is that it fails to show that this Court has jurisdiction over its subject matter. Seven separate grounds are set forth for this contention. We will glance at each.

(a) *The Complaint Describes an "Actual Controversy".*

The defendant asserts that the complaint "does not allege an 'actual controversy' within the meaning of

[28 USCA Sec. 2201]; and the plaintiff therefore is not entitled to a declaratory judgment". We have already fully summarized the complaint and the evidence adduced in its support: no unbiased reader of the record can fail to see that a real and pressing controversy does exist between the parties. We have also set out the salient provisions of Sec. 530. Sections 2110-2112 provide fines and imprisonment for violations of the Public Utilities Act. If a United States officer were to negotiate with a carrier for "reduced rates" without permitting the defendant to determine whether it "considered" the conditions of the contract "just and reasonable", he could be thrown into the county jail. He at least would speedily be convinced that there existed a "controversy" between his Government and the State of California!

The defendant cites Public Service Commission of Utah v. Wycoff Co., 1952, 344 U.S. 237, and Public Utilities Commission of California v. United Air Lines, 1953, 346 U.S. 402. We believe that neither case is in point. In *Wycoff*, the plaintiff sought a declaratory judgment that its carriage of motion picture film and newsreels between points in Utah constituted *interstate* commerce, and that the Public Service Commission of Utah should be forever enjoined from interfering with such transportation over routes authorized by the Interstate Commerce Commission. *The plaintiff specifically disavowed any attack upon the constitutionality of any Utah statute or the validity of any order of the State Commission.* 344 U.S. at pages 239-240. The Supreme Court held that the suit could not be maintained. In *United Air Lines*, the controversy centered around the question of whether air transportation

between Santa Catalina Island and the mainland of California was subject to the jurisdiction of the present defendant or to the Civil Aeronautics Board of the United States. A three-judge District Court held that the United Air Lines, Inc., was entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff air line. There, again, there was no question of the constitutionality of a State statute. The Supreme Court reversed, on the authority of *Wycoff*. Neither case aids the present defendant.

(b) *The Plaintiff Was Not Obliged to "Exhaust" Any "Administrative Remedy" by Instituting a Proceeding Before the Defendant.*

In the instant suit, the plaintiff does not question the propriety of an act of the defendant, but asserts that sec. 530 is unconstitutional in so far as it purports to authorize the defendant to regulate the rates for the carriage of the plaintiff's goods. The defendant contends that "the plaintiff has failed to exhaust the administrative remedy available to it," and cites six Supreme Court cases as supporting that statement. We have examined each of those six decisions, and find that *not one dealt with the constitutionality of a State statute.*

On the contrary, in Panitz v. District of Columbia, C.A., D.C., 1940, 112 F. 2d 39, 41, Associate Justice Vinson of the Court of Appeals for the District of Columbia, and later Chief Justice of the United States, cautioned against permitting administrative agencies to pass upon the constitutionality of statutes. The learned jurist said:

"Did the assessor, as an administrative official, have inherent power to rule on constitutional objections to the tax? It has been said that the necessities of our system require the *judiciary* to determine the constitutionality of Acts of the legislature. There can be little doubt that it represents the highest exercise of judicial power, and one that even the judiciary is reluctant to exercise. Interruption of the machinery of government necessarily attendant on this function not only cautions the judiciary *but argues as well against its exercise by other agencies.* It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize *in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution.* Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate. Likewise, it has been held that an administrative agency invested with discretion has no jurisdiction to entertain constitutional questions where no provision has been made therefor. In respect to taxation it is frequently stated that one need not pursue his administrative remedy where the tax is void. *Here again is apparent a reluctance to invest non-judicial agencies with jurisdiction to rule on the validity of statutes.*" [Emphasis supplied.]

(c) *The Complaint Is Not Bottomed Upon a Ground That Is Within the Primary Jurisdiction of the Defendant as an Administrative Agency.*

The defendant claims "primary jurisdiction" in this case on the ground that the complaint recites that "Since time would be of the essence, it would be impossible to

obtain Commission approval of rates and, accordingly, shipments by the United States would be thrown into the class rate, which as applied to such shipments is recognized as unrealistically high,'" etc. From this recital the defendant seeks to spell out jurisdiction for itself, because "this allegation calls for a determination of whether or not 'class rates' covering such shipments are 'unrealistically high' because of certain alleged peculiar characteristics of such shipments". It is therefore argued that such decision "calls for the exercise of an informed administrative judgment".

The defendant here overlooks the fact that the gravamen of the complaint is not that the plaintiff would have to pay unrealistically high rates if Sec. 530 were applied to it, but that the section is void under Article VI, Section 2 of the Constitution in that:

> "1. For no valid reason within the police powers or other reserved powers of the State of California, [Sec. 530 and related sections] place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Sec. 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States."

Thus it is clear that this action is based upon the *unconstitutionality* of Sec. 530, principally because it interferes with the plaintiff's discharge of its Constitutional powers and duties relating to the raising and the support of "Armies and a Navy". The first sentence of Article I, Section 8 of the United States Constitution gives Congress the power to "provide for the common Defense and gen-

eral Welfare of the United States." How the application of Sec. 530 would "hamper and hinder" the plaintiff in carrying out its Constitutional functions has been clearly shown by the testimony of high-ranking officers of the armed services. This "hampering and hindering" is not principally the result of the application of "class rates". The Constitutional objection, as we have seen, goes far deeper than that.

It is well settled that a state statute which places an unreasonable burden upon the discharge of a Federal function is unconstitutional.

Nearly a century and a half ago, Mr. Chief Justice Marshall laid down this fundamental principle, which he observed "may be almost termed an axiom". In M'Culloch v. The State of Maryland, 1819, 4 Wheat. 316, 426-427, the great jurist said:

> "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.
> * * *
>
> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution."

And, in connection with Judge McKeage's solemn avowal, *supra*—an avowal in which we have the utmost

confidence—we can only say, in the words of Mr. Chief Justice Marshall in this same opinion, "This, then, is not a case of confidence." 4 Wheat. at page 431.[2]

(d) *By Its Plain Terms, the Johnson Act Does Not Apply To This Case.*

The defendant contends that the Johnson Act, quoted in full, *supra,* prohibits this Court from granting the relief requested by the plaintiff. We are somewhat surprised that learned counsel seriously urges this point, in view of the fact that *four* conditions to the application of the Act are specified therein, *all* of which must concur, and each of which relates to an order, not a *statute*. Since the conjunction "and" is used as the connecting word between the conditions, it is clear that all four contingencies must be present before the Act can apply.

The very first statutory condition at once makes the Johnson Act inapplicable here; for it sets forth that it comes into play only when "Jurisdiction is based *SOLELY* on diversity of citizenship *or* repugnance of the *ORDER* to the Federal Constitution." [Emphasis supplied.] In the instant case, the jurisdiction of this Court is based principally upon the unconstitutionality of a *statute*, not of an "*order* . . . made by a State administrative agency or a rate-making body," etc.

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[2]See also Osborn v. Bank of the United States, 1824, 9 Wheat. 738, 870; Weston v. City Council of Charleston, 1829, 2 Pet. 449, 468; Ohio v. Thomas, 1899, 173 U.S. 276, 283; *Re* Heff, 1905, 197 U.S. 488, 505; Johnson v. Maryland, 1920, 254 U.S. 51, 55-57.

(c) *The Other Grounds of the Defendant's Attack Upon the Jurisdiction of This Court.*

The remaining attacks upon the jurisdiction are somewhat related, and will be considered together briefly. They are:

(1) The plaintiff will not suffer irreparable injury in the absence of injunctive relief, but has an adequate remedy elsewhere.

(2) The Court is required by law to abstain from granting the relief requested in order to preserve comity between the plaintiff and the State of California.

(3) The subject matter of the complaint is within the exclusive jurisdiction of the State of California.

(1) We have fully summarized the allegations of the complaint. For the purposes of the motion to dismiss, they must be taken as true. The single allegation that the enforcement of Sec. 530 "would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public "patterns of movement," etc., of itself spells out one ground for equitable intervention. We are here dealing not chiefly with considerations of the market place, but with the plea of a constitutional sovereign to be permitted to discharge, without State interference, its duties in connection with its greatest task—the defense of the nation itself.

(2) Similarly, in none of the cases cited by the defendant under this heading was the United States Govern-

ment seeking to have declared unconstitutional a State statute, plain on its face, that by its very terms would subject the Federal sovereign to restrictions and delays in the exercise of its paramount right, power, and duty of providing itself speedily and economically with the engines of self-defense.

(3) The defendant contends that the subject matter of the complaint is within the State's exclusive jurisdiction. But the subject matter of the complaint is California's placing "an unreasonable burden and impediment on the United States in the discharge of its constitutional powers" in connection, as we have seen, with the national defense. We do not believe that national defense is "within the exclusive jurisdiction of the State of California." The plaintiff is not attacking the defendant's *general* power to fix rates: it is merely objecting to a statute that by its terms permits a State Commission to impose "conditions" upon the granting of reduced rates to the Federal sovereign, even when they relate to activities connected with the national defense.

Heavy reliance is placed by the defendant upon the case of Penn Dairies Inc. v. Milk Control Commission of Pennsylvania, 1943, 318 U.S. 261, 270, in which, pursuant to the Pennsylvania Milk Control Law, a renewal of the license of a milk dealer was refused by the Commission because the dealer, in violation of the state law, had sold milk to the United States below the minima fixed by the Commission. It was there held that such application of the State law to the dealer was not precluded by the Constitution or laws of the United States. Justices Douglas, Black, and Jackson dissented.

In the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they [wished], without incurring any penalty". Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

> "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the *Penn* case did not involve the procurement of the engines of war. There is a constitutional difference between a can of milk and a hydrogen bomb!

8. *The Complaint States a Claim Upon Which Relief Can Be Granted.*

As the defendant itself points out, the section of its brief dealing with jurisdiction discusses "certain deficiencies in the complaint". In discussing other alleged "defi-

ciencies", in addition to those asserted under the jurisdictional heading, the defendant objects that "Most of the allegations are not well pleaded "for one reason or another". [sic] The entire discussion of these asserted "defects" consumes less than one typewritten page, and ends with the following bare statement:

> "When the complaint is stripped of all the allegations that are deficient in one or more of these respects, the only things left are allegations that the California Legislature amended Sec. 530 . . . , and that the application of such amended statute will result in increased cost and expense to the United States in the transportation of its property. Even the second of these allegations is lacking in particularity. Assuming, however, without conceding, that these two allegations are well pleaded, they do not furnish any basis for relief by this Court."

It is clear that this assortment of glittering generalities adds nothing to the legal argument, and that the defendant is relying upon the first section of its brief as expounding the gravamen of its objection to the complaint. The second section contains an extensive vocabulary of adjectives, such as "vague", "ambiguous", "conjectural", and "irrelevant", but does not greatly advance the thought.

9. *Conclusion.*

In a dictatorship, the warlords do not even *demand*—much less *request*—authority to negotiate with private parties for the supply of their war needs. Autocrats *take* what they want!

It is therefore a heartening spectacle, in a Constitutional democracy, to see a group of military men, speaking for the sovereign itself, appear in a civil court to *plead* to be allowed to carry out their Constitutional functions by being permitted to contract freely, with privately-owned carriers to supply the Government's transportation needs.

But this very subordination of the military to the civil power—fundamental in every true democracy—itself imposes a grave responsibility upon civil courts. We dare not, in good conscience and under the Constitution of the United States, deny relief to such a suitor when it proves to our satisfaction that such denial would hamper the national defense.

Such proof the present plaintiff has produced in abundance. We do not believe that a federal court, after listening to such testimony and dispassionately reviewing the record, as we have done, can or should stay its hand when legitimate relief is requested by the armed forces of the nation.

Accordingly, we hold that, in so far as Sec. 530, *supra*, purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the plaintiff, it is invalid, void and of no effect, as contravening the provisions of the United States Constitution relating to the national defense, *supra*. The defendant is permanently enjoined from enforcing any of the restrictive provisions of Sec. 530 as against the plaintiff. Counsel for the plaintiff will

prepare proposed findings of fact, conclusions of law, and form of judgment, in accordance with this opinion.

Dated this 30th day of April, 1956.

DAL M. LEMMON
United States Circuit Judge

OLIVER J. CARTER
United States District Judge

OLIVER D. HAMLIN, JR.
United States District Judge

FILED
Jun 5 1956
C. W. Calbreath, Clerk
U. S. Dist. Court

United States District Court
For the Northern District of California
Southern Division

United States of America, Plaintiff, vs. Public Utilities Commission of the State of California, Defendant.	Civil Action No. 35101

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on to be heard before the duly constituted district court of three judges established pursuant to Title 28, Sections 2201, 2281 and 2284 of the United States Code, and the defendant having moved to dismiss the action, and full argument having been had on defendant's motion to dismiss on February 9, 1956, and the court having overruled the defendant's motion to dismiss on February 17, 1956, and a full hearing with submission of evidence by the plaintiff and the defendant having been had on the week of March 18, 1956, and counsel for the parties having been heard on April 19, 1956, and the court having filed its opinion herein on

April 30, 1956, now, in accordance with the opinion heretofore filed, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I.

In order to provide for the common defense, the United States has established throughout the United States and the world a number of installations and establishments, both civil and military, which are integrated into a general nation-wide and world-wide system designed to maintain the country's strategic position in the light of the present world-wide political and military situation. In order to supply the various operational and training establishments, there has been established what is commonly called a depot system, consisting of a number of storage and supply points. The various depots and supply points are integrated into a complex system throughout the world designed to meet the logistical requirements of the defense establishments at any particular time. There is a constant flow of materiel through this system at a velocity and in directions determined by the military needs.

II.

There are approximately 152 military installations of all types situated within the State of California, consisting of depots, training centers, air stations, naval operation bases, research centers, proving grounds, embarkation centers, ammunition magazines, hospitals, and almost every other type of military establishments. In addition to the strictly military installations within the state, Cali-

ornia is the center of the aircraft manufacturing indus-
ies of the country, and the various aircraft manufac-
rers, through contracts with the United States, perform
esearch and experimental work in the development of
rcraft and guided missiles. There is a constant flow of
ateriel of all types from out of the state to the various
stallations within the state, and from the installations
ithin the state to other states. There is likewise a con-
ant flow of materiel from an installation in the state to
nother installation in the state, either for consumption
the destination in the state or for further shipment out-
de of the state. There is a substantial shipment from
orage points within the state to ports for shipment over-
as and for the supply and repair of Naval vessels. Of
0 million dollars expended by the Department of Defense
the fiscal year of 1954 and 1955 for the transportation
materiel, approximately 20 million dollars was expended
r the movement of property from one location in Cali-
rnia to another location in California.

III.

Many items of military materiel are highly secret in
ture and, for security reasons, every effort must be made
limit the knowledge of the character of the items
ipped to as few people as possible. In addition to the
cret character of many of the military items, frequently
e location of a military installation is a matter of secrecy
d materiel routed to these locations must be routed in
ch a way that the ultimate destination is kept secret.
here are a number of such installations in California and
equently shipments are made to such installations.

IV.

Under the doctrine of dispersal as a defense against air attack, the various military installations in California and elsewhere, particularly the depots and supply centers, are usually widely dispersed and an effort is made in their location and function to see to it that the destruction of one facility would not completely disrupt the plan of operation in the event of emergency by creating critical shortages of essential materiel and items of supply. In addition, the depot system and other supply installations are so located that in the event of emergency there will be as little congestion as possible at the various ports and other transit centers, in order that maximum use may be made of the transportation facilities. Likewise, supply points are so located that it is possible to divert materiel from one port to another port on very short notice to minimize the effectiveness of enemy submarine operations. Due to the peculiar requirements of training centers, proving grounds, research centers and firing ranges, they are likewise usually located outside of large areas of population. Thus, due to the peculiar requirements of the establishments related to common defense, their location has little or no relationship to State boundaries or the normal channels of trade or commerce but are fixed by strategic, tactical and logistical requirements.

V.

As a result of the factors set forth above and other factors the pattern of military traffic differs essentially from commercial traffic in many respects. First, military materiel is consumed in military activities and does not

compete in the commercial market with commercial commodities. Secondly, military materiel consists of hundreds of thousands of items, being either weapons of war or related thereto, which have no relation whatsoever to the types of commodities which flow in the channels of trade. Thirdly, due to the peculiar requirements of military operations and activities, it is frequently necessary and desirable to ship a great many diverse items in one shipment or carload. Fourthly, from the nature of military operations and the location of installations, in a great many instances shipments are made to locations which have no relation to the normal flow of commercial traffic. Fifthly, due to the nature of military operations, frequently the necessity for shipment of materiel arises on very short notice, particularly in times of emergency. Sixthly, in many situations, particularly in times of emergency, time is of the absolute essence in making a shipment of materiel. Lastly, many items of military materiel are highly secret and at times must be secretly and circuitously routed for purposes of security.

VI.

Due to the nation-wide and world-wide character of the military establishments and their close interrelation and integration one with the other, a very high percentage of military materiel situated in the depot system and other installations in any State, including California, at any given time, originates from outside of the State, and a very high percentage of such materiel, at any given time, is destined for points outside of the State. Materiel and items in supply which originate in the State, or are destined for points in the State, are mixed indiscriminately

in the depot system and other installations with materiel which originates outside of the State, or is destined for points outside of the State. Due to the high cost of many weapons and other military equipment and the frequent change in design and improvement, an effort is made to keep the stocks and inventory in the depot system and other supply centers as low as possible. Thus, there is a rapid current of materiel flowing through the depot system and the other installations to points of ultimate destination and consumption throughout the several States and overseas. Since in most instances such materiel is to be consumed in military activities which may depend on contingencies which arise from time to time in the world situation, frequently it is impossible to determine at any given time the ultimate destination of such materiel.

VII.

A number of installations and establishments of the United States within California are situated on land which has been ceded by the State of California to the United States and is held by the United States under varying terms and conditions pursuant to the authority conferred upon it by Article I, section 8, clause 17 of the Constitution of the United States. There are frequent shipments of property within the State originating in installations of this type or terminating in installations of this type.

VIII.

Insofar as it is practical under the requirements of defense, it is the policy of the Defense Department to utilize commercial carriers in the transportation of its supplies.

Since the creation of the Federal Government and the establishment of the Armed Services, it has been the practice in the moving of supplies and materiel for the United States by common carrier for duly authorized officers or officials of the United States to negotiate rates for many Government shipments. When the Interstate Commerce Act was enacted in 1887 providing for the publication of uniform tariffs by common carriers in interstate commerce, section 22 provided that the general provisions of the act providing for the publication of uniform tariffs did not apply to shipments for the United States. Since the earliest times, the powers and duties of the officers of the United States to make such special arrangements for the transportation of property applied alike to shipments which were interstate or intrastate so far as geographic termini were concerned.

IX.

In engaging carriers to transport materiel and supplies from one installation in a State to another installation in the same State, it is the policy of the Department of Defense to engage only those carriers which are duly certificated and qualified under the State laws and regulations to operate on the highways of the State between the particular points involved. In the event that it is difficult for the officers arranging the transportation to determine whether or not the particular shipment in fact is interstate or intrastate commerce under applicable doctrines of law, it is the policy of the Department of Defense to engage a carrier which is duly certificated and qualified under the requirements both of the Interstate Commerce Act and the State statutes and regulations.

X.

For many years section 530 of the Public Utilities Code of the State of California expressly exempted transportation of materiel of the United States from the provisions of the statute relating to the filing of tariffs and approval of rates, and for many years shipments were made by the United States between points in California in accordance with the long established general custom of making special arrangements or contracts for such shipments when circumstances so required. In July 1955 the California Legislature amended section 530 of the Public Utilities Code. California Statute 1955, Ch. 1966. This amendment expressly provided that the Public Utilities Commission of California might "permit common carriers to transport property at reduced rates for the United States, State, county or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

XI.

Under the normal practice of the Public Utilities Commission of California at least a month has been required for the approval of any rate submitted to it for approval if no person or corporation protested such rate. It has likewise been the practice of the Public Utilities Commission to hold a public hearing in the event that a published rate were protested. Public hearings under this procedure are frequently protracted. At the hearing in the case at bar, the counsel for the Public Utilities Commission stipulated in the record that in the event that section 530 of the Public Utilities Code of California, as amended, were put into effect, he would recommend to the Commis-

sion that such hearings be dispensed with in cases involving the shipment of property for the United States. It was likewise stipulated in the record by the counsel and other responsible officials of the Commission that the Commission's procedure would be administered in such a way that approval of rates proposed by carriers involving shipments for the United States would be expedited.

XII.

Under the theory of rate regulation in California and elsewhere, every common carrier is required to have in existence at all times a published rate to cover the shipment of every known item between every conceivable point. This rate structure is known as the class or "paper rate." Since the channels of commercial traffic are regular and well defined in accordance with the stability of trade, large commercial shippers seldom use the class rate but negotiate rates with the carriers knows as "commercial rates," which are peculiarly suited and adapted to the requirements of the commerce involved. These commercial rates are usually considerably lower than the class rates. Very little commercial traffic moves at the class rate.

XIII.

As previously found, military shipments are frequently made to remote destinations on short notice, and in many situations, particularly in times of emergency, time is of the essence. Due to the character of the commodities and points of origin and destination, from the nature of things, there will be no published commercial rate under which the shipment might be made. As a matter of practice in

times past in situations of this sort, if a shipment were relatively small, the officers of the United States would ship at the class rate. In the event that the density and volume of the particular shipment were large, the officers of the United States, through their power to make special arrangements, will negotiate with the carriers for a rate which would be comparable to a rate established in commercial traffic for a similar shipment. Through flexible procedures now employed by the various military services, rates for shipments of this type can be arranged in a matter of hours, and, if time is of the absolute essence, the shipment might be made and the rate would be arranged retroactively. In negotiating rates in this manner, it is the policy of the Department of Defense to base a negotiated rate on studies of comparable commercial rates. Many shipments of this character are made in the State of California. In the event that section 530 of the Public Utilities Code of California, as amended, is put into effect, making it necessary for special rates for such shipments to be approved by the Commission under present Commission procedures many of such shipments would have to be made at the class rate. In many instances the class rates would be 50% to 100% higher than the commercial rate for shipments of similar character.

XIV.

From the nature of military operations and movements, it is frequently necessary and desirable to ship truckloads and carloads of hundreds of different items for the supply of a unit or division, or the loading of some vessel for a military expedition, or a similar operation. In many

instances these numerous items are segregated into chests and boxes designed to facilitate tactical requirements under field conditions. In shipments of this sort it has been the custom and practice for the officers of the United States to negotiate and arrange a rate for the entire truckload or carload. Such rates are known as "freight all kinds" rates, and shipments are so described in simple form on the bills of lading and other shipping documents. There is no provision in the California Code or regulations for the making of such shipments. Accordingly, in the event that section 530 of the Public Utilities Code is amended to apply to shipments by the United States, this type of arrangement would be abolished. This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many stiuations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.

XV.

In addition to the fact that the abolishment of the practices of the officers of the United States in negotiating rates for "freight all kinds" on truckload and carload basis would cause undue delays in many situations, it would also invaribly increase the freight rates charged to

the United States in many particular situations. This would result from the fact that many military items, particularly those relating to weapons of war, electronic equipment, and military aircraft, have no counterpart in commercial traffic. Accordingly, in many situations it would be impossible to segregate and ship the various items under any rate other than the class rate. In addition, due to the fact that military items are segregated and arranged in accordance with tactical and logistical requirements, and due further to the fact that under the class rate structure the entire unit of shipment will bear the classification of the highest item in the mass, frequently many military shipments which for tactical reasons cannot be resegregated would be thrown into a very high classification. In many situations, the freight rate for such shipments would be increased by 150%.

XVI.

In the event that it were necessary for the officers of the United States to classify the many items shipped by it prior to shipment, to segregate the items, and in many instances meet the packing requirements customary in commercial shipments, it would be necessary for the shipping agencies of the United States to increase their forces in order to meet the additional administrative burden. In typical situations the increase in personnel would amount to as high as fifty percent. Men who are now free for more direct military service might have to be trained and used for the preparation of documents and the attention to administrative and shipping detail. Not only would the administrative burden be increased on the shipping level,

it would likewise be necessary to increase the personnel to meet the increased administrative load at the higher echelons in the work of review and in auditing the shipping documents.

XVII.

In the event that it is necessary for the officers of the United States to obtain approval of rates for the shipment of military materiel and other Government property by the California Commission, and other state commissions, a great deal of time of skilled personnel would be consumed in commission proceedings. It would become necessary for highly skilled officers in operational functions to consume considerable time in the preparation of exhibits and in testifying before the commission.

XVIII.

In the event that Section 530 of the California Code, as amended, is put into effect, the Commission would have the power to require the officers of the United States to furnish all information and data necessary for it to determine whether or not a rate were just and reasonable. Under this power the Commission might require the furnishing of information of a secret nature relating both to the type and character of the items or materiel shipped or to the destination of the shipment. Revelation of information of this sort to a public body would seriously jeopardize the security of the United States. In addition to the fact that the revelation of specific information of a secret nature would jeopardize the security of the United States, the furnishing of general information to the public utilities commis-

sions of the various states might reveal a pattern of movement which would be subject to interpretation by espionage agents who might gain therefrom vital information for the aid of an enemy. At the hearing in this case, the counsel for the Commission stipulated in the record that in administering Section 530 of the Public Utilities Code, as amended, he would recommend to the Commission that a rule be adopted whereby upon certificate of responsible officers of the United States to the effect that certain information required for rate determination was secret, the Commission would not require the furnishing of the information.

XIX.

Due to the nation-wide and world-wide integration of the depot system and other military installations and the character of the flow of military items and materiel through the depot system, it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character under applicable doctrines of law. Thus, in many situations officers of the United States would be required to make difficult determinations of law and fact to determine whether or not particular shipments fell within the provisions of Section 530, as amended. In addition, many shipments within the state are made from installations and enclaves over which the United States has jurisdiction. In many situations it would be difficult to determine whether or not such shipments were subject to regulation by the state commission. In addition, the necessity of such determination in many instances would make it

necessary to segregate materiel within the various depots and installations in accordance with its origin or destination, and in making many shipments it would be necessary to segregate materiel put into particular trucks or cars in accordance with its origin or destination. Thus, the necessity of the determination would result in delays, increased man-hours of work on the part of military personnel, friction and possible litigation.

XX.

In the event that a number of states in addition to California assert jurisdiction over the regulation of the rates for the shipment of military materiel, the delays, increased cost of transportation, increased administrative burden and danger of revelation of secret matters might become so great that it might be necessary to redesign and relocate the depot system or to curtail the functions of certain depots for the purpose of bringing about a situation in which most of the shipments of the materiel would be in interstate commerce and therefore not subject to the regulation of state commissions. Such a rearrangement of the depot system would have no rational relation to the logistical principles upon which it is now based and would entail a loss of efficiency in the performance of the functions of the national defense.

XXI.

Sharpe General Depot situated at Stockton, California, is a large general supply depot carrying such supplies as food, clothing, medicine, engineering equipment, tenting, and similar supplies. Normally this depot ships general supplies to the various military installations within the

state and to ports for shipment overseas. The primary mission of the depot, however, is to furnish relief in the event of disaster resulting from earthquake, fire, or flood. Most of the general military supply functions of this depot could be performed efficiently from a general depot located at Ogden, Utah. In the event that the activities of Sharpe General Depot were curtailed, of necessity its capacity to furnish relief in times of disaster would be reduced.

XXII.

Certain installations within the State of California are situated near state boundaries and alternate routes are available for the shipment of materiel from the installations to points within the state, one of which routes would cross state boundaries. In certain situations different carriers are certificated to carry over the different routes. In the event that the regulation by the State Commission resulted in undue delays, increased expense and administrative burden, the officers of the United States charged with the responsibility of routing the shipment of the materiel would choose the interstate route. This would result in some instances in prejudice to carriers and might entail a longer route.

XXIII.

The delays, increased administrative burden, increased expense and the danger to security that would result from the application of section 530 of the Public Utilities Code, as amended, would be multiplied many times in time of war. In the event that a number of the states enacted similar statutes, a serious impediment would be placed on the successful prosecution of the war.

XXIV.

Since the items and commodities shipped by the United States do not compete in commercial markets, there can be no prejudice to persons or localities in the State of California if the United States follows the custom and practice of negotiating rates with the carriers directly for particular shipments.

XXV.

In its brief directed at the defendant's motion to dismiss this action, the counsel for the plaintiff took the position that under the terms of section 2112 of the Public Utilities Code of California officers of the United States in engaging carriers within the state would be subject to criminal prosecution and possible jail sentences and fines for any violations of the Public Utilities Code or regulations of the Commission. At the oral hearing on the motion to dismiss, the counsel for the Commission did not take issue with the interpretation placed on the statute by the counsel for the plaintiff.

XXVI.

All carriers which carry property for the United States within a state at less than published rates do so voluntarily. There are approximately 12,000 carriers within the State of California which have authority to carry property for the United States within the state. Approximately 100 of such carriers actually engage in this traffic regularly. There has been vigorous competition in recent years among the carriers specializing in the carriage of Government property, and there has been some lowering of the general rate level in this particular traffic.

However, there is no evidence of record of any bankruptcy or financial disaster on the part of these carriers. Generally, the transportation industry within the State of California is in a healthy economic condition. The annual report of the Public Utilities Commission of the State of California for the fiscal year 1954-1955 shows an earned gross revenue of $550,730,132 on the part of all carriers. This was an increase of $11,696,720 over the gross revenue for the preceding year. It was an all time high. During this year the United States expended approximately 20 million dollars within the state for transportation from one installation in the state to another. The annual report likewise shows that the fiscal year was one of general freight rate stability.

CONCLUSIONS OF LAW.

I.

The court has jurisdiction over this cause and the parties thereto.

II.

The complaint states a claim upon which relief can be granted.

III.

The complaint describes an actual controversy within the meaning of Title 28 U.S.C. section 2201 which confers upon this court the power to declare the rights and duties of the parties to the action.

IV.

The burden rests upon the plaintiff to establish by clear proof that the pertinent provisions of section 530 of

the Public Utilities Code of California as applied to it are unconstitutional and void as being repugnant to the Federal Constitution.

V.

The evidence of record clearly proves that for no valid reason within the police powers or other reserve powers of the State of California the application of section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense.

VI.

By section 22 of the Interstate Commerce Act, 24 Stat. 387, the Armed Services Procurement Act, 41 U.S.C. section 151(c), the Federal Property Administrative Services Act of 1949, Public Law 1952, 81st Cong., 1st sess., sections 201 and 202, 63 Stat. at page 377, Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by Commissions and other bodies vested with the power of regulating the rates for the transportation of property generally.

VII.

The regulation of the rates for the shipment of military materiel intrastate by the several States would so drastically hamper and interfere with the officers of the United States in the discharge of their responsibility of

supplying the defense establishments and related activities and would so endanger the security of the United States that State statutes conferring such power upon State regulatory bodies would be unconstitutional and void as contravening the provisions of the United States Constitution relating to the national defense in the absence of any act of Congress. Such State statutes would be valid only upon the condition that Congress enacted a statute expressly authorizing the various States to regulate such rates. See collation of cases in *Morgan v. Virginia*, 328 U.S. 378.

VIII.

The principle announced in *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, has no application to the facts in this case because under the regulation there involved there would be no direct interference with the officers of the United States in the discharge of their responsibilities, and there would be no delays or increased administrative burden and revelation of secret matter in the procurement of the items of supply there involved. Further, the regulation of the price of milk by a State has a relation to the health of the population of the State.

IX.

Since the issue in the instant case is one of the existence of a constitutional power, stipulations by counsel of the State Commission and other officials of the Commission that its regulations will be of such character that any burden on the United States in the discharge of its responsibility to provide for the national defense will be brought to a minimum and that it will not require the

furnishing of secret information in the administration of the statute involved, though made in utmost good faith, are irrelevant. *McCulloch v. Maryland*, 4 Wheat. 316.

X.

Insofar as section 530 of the Public Utilities Code of California purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers to the plaintiff and the carrying of its property and materiel, it is invalid, void and of no effect as contravening the provisions of Article I, sec. 8, clauses 11, 12, 13, 16 and 17, and Article IV, sec. 3, clause 2, of the Constitution of the United States.

XI.

In the event that section 530 of the Public Utilities Code of California, as amended, is applied to the plaintiff, it will suffer irreparable injury and it has no adequate remedy at law.

Dated this 5 day of June, 1956.

/s/ Dal M. Lemmon
Dal M. Lemmon
United States Circuit Judge

/s/ Oliver J. Carter
Oliver J. Carter
United States District Judge

/s/ O. D. Hamlin
Oliver D. Hamlin, Jr.
United States District Judge

United States of America,
Northern District of California—ss:

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original findings of fact and conclusions of law, filed June 5, 1956 in Case 35101-Civil, United States of America, Plaintiff vs. Public Utilities Commission of the State of California, Defendant, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, this 20th day of June, A.D. 1956.

C. W. Calbreath,
Clerk.
By Margaret P. Blair,
Deputy Clerk.

United States District Court
For the Northern District of California
Southern Division

United States of America, Plaintiff, vs. Public Utilities Commission of the State of California, Defendant.	Civil Action No. 35101

JUDGMENT.

This case having come on for final hearing, and the court having filed its opinion on April 30, 1956, and findings of fact and conclusions of law having been filed this day, now therefore in accordance with the opinion and findings of fact and conclusions of law it is ordered, adjudged and decreed:

1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, section 8, clauses 11, 12, 13, 16 and 17, and article IV, section 3, clause 2, of the Constitution of the United States.

2. Defendant Public Utilities Commission of the State of California and its agents and employees are hereby

permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for the transportation of property of the United States.

Dated this 5 day of June, 1956.

/s/ Dal M. Lemmon
United States Circuit Judge
/s/ Oliver J. Carter
United States District Judge
/s/ O. D. Hamlin
United States District Judge

Endorsed: Filed June 5, 1956, C. W. Calbreath, Clerk.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

C. W. Calbreath,
Clerk, U. S. District Court
Northern District of California.
By Margaret P. Blair,
Deputy Clerk.

Appendix "B"

U. S. CONSTITUTION

Article I

Section 8

The Congress shall have Power * * *

[cl. 3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

* * * * * * * *

[cl. 7] To establish Post Offices and post Roads;

* * * * * * * *

[cl. 11] To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[cl. 12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[cl. 13] To provide and maintain a Navy;

* * * * * * * *

[cl. 16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erec-

tion of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—and

[cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article IV

Section 3

[cl. 2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI

[cl. 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Appendix "C"

Federal Statutes

28 U.S.C. Sec. 1342 (62 Stat. 932)

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. Sec. 2201 (68 Stat. 890)

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

49 U.S.C. Sec. 22 (58 Stat. 751)

Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced

rates for the United States, State, or municipal governments * * *

41 U.S.C. 151

"The provisions of this chapter shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds."

* * * * * * * *

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

"(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

"(2) the public exigency will not admit of the delay incident to advertising;

* * * * * * * *

"(10) for supplies or services for which it is impracticable to secure competition;

* * * * * * * *

"(17) otherwise authorized by law."

40 U.S.C. 471

"It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and

supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management."

40 U.S.C. 481

"(a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

* * * * * * * *

"(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies; *Provided*, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1) - (4) of this subsection whenever he determines such exemption to be in the best interests of national security."

Appendix "D"

Decision No. 51047

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).	Case No. 5432 Petition for Modification No. 34

Edward M. Berol and *Lewis Clark*, for California Government Traffic Conference, petitioner.

J. C. Kaspar, for Motor Truck Association; *L. E. Osborne*, for California Manufacturers' Association; *Arlo D. Poe*, for Motor Truck Association of California; *T. A. L. Loretz*, Tariff Agent; *J. L. Beeler*, for Southwestern Motor Tariff Bureau; *Maurice A. Owens*, for Draymens Association of Alameda County, Pacific Motor Tariff Bureau; *H. L. Mathewson*, for Pacific States Motor Tariff Bureau; *A. F. Schumacher* and *P. N. Kujachich*, for Owens-Illinois Glass Co., Pacific Coast Division; *Jess E. Francis*, for Continental Freight Lines; *C. R. Nickerson*, for Pacific Coast Tariff Bureau; *Harry Marioneaux*, for Alves Service

Transportation Co., All-State Transportation Co., and J. A. Nevis Trucking Inc.; *Graeme Perton*, for Constructors Transport Co.; *Harold F. Culy*, for Culy Transportation Co., Inc.; *E. J. Muzio*, for Miles & Sons Trucking Service and Miles Motor Transport system; *John W. Smith*, for Southern Pacific Company and Pacific Motor Trucking Company; *James E. Doyle*, for Doyle Draying Co.; *W. J. Pope*, for Aetna Freight Lines; *Peter Vinick*, for Lodi Truck Service and *Walter Alves*, for All-State Transportation Co., Inc.; and Alves Service Transportation Inc., interested parties.

Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense.

J. A. McCunniff, of the Commission's staff.

OPINION

On June 3, 1954, petitioner California Government Traffic Conference filed Petition for Modification No. 34 in Case No. 5432 seeking to eliminate from Item No. 20 Series of Highway Carriers' Tariff No. 2 (now Minimum Rate Tariff No. 2) the paragraph reading as follows:

> "Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

On June 17, 1954, said petition was amended to provide that instead of eliminating the above-quoted paragraph it be amended to read as follows:

"Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States, *to the extent necessary to meet the rate of a common carrier on file for use with the armed forces of the United States, pursuant to Section 530 of the Public Utilities Code.*"

(Italicized portion constitutes addition.)

Public hearings were held before Examiner Wilson E. Cline at San Francisco on November 3, 4 and 5, 1954. The matter was taken under submission upon the filing of certain exhibits November 12, 1954.

California Government Traffic Conference is an association of all classes of highway carriers engaged in the transportation of property for the armed forces of the United States. Exhibit No. 13 lists its members as follows:

Aetna Freight Lines, Anaheim Truck & Transfer Co., Arrowhead Freight Lines, Ltd., Asbury Transportation Co., Bigge Drayage Co., California Cartage Company, Inc., Citizens Transportation Company, City Messenger Air Express Co., Coast Counties Express, Constructors Transport Co., Continental Freight Lines, Delta Lines, Inc., Doyle Draying Co., Empire Transportation Company, Fortier Transportation Company, Chas. P. Hart Transportation, Lodi Truck Service, Miles & Sons Trucking Service, Miles Motor Transport System, Northern Transportation Co., Oregon Nevada California Fast Freight, Inc., Orr Tank Lines, Pacific Freight Lines, Paxton Truck Co., Sacramento Freight Lines, Inc., Sullivan Trans-

portation Co., Valley Motor Lines, Inc., Ventura Transfer Co., Victorville-Barstow Truck Lines, Warren Transportation Company and Western Transportation Company.

The paragraph in Item No. 20 Series of Minimum Rate ariff No. 2 which petitioner is requesting to be modified as incorporated in said Item No. 20 Series by Decision o. 42031, dated September 14, 1948, in Case No. 4808. said Decision, 48 Cal.P.U.C. 237,239, the Commission ated:

"From the evidence of record it is apparent that radial highway common, highway contract and city carriers are disadvantaged by the statutory privileges accorded only to common carriers in the transportation of government traffic. An equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments should be accorded all classes of carriers."

As justification for the proposed modification petitioner leged in the amended petition herein:

"Certain permit carriers have taken liberal and literal advantage of the * * * equal opportunity to compete freely from a minimum rate standpoint for the movement of competitive government shipments * * *. In doing so they have driven rates for the handling of such government shipments to a depressed and unreasonably low and unlawful level. Your petitioner is informed and believes, and upon such information and belief alleges, that the government is the largest single shipper of commodities moving between points in the State of California. That carriers handling such traffic at unduly low and

depressed rates are creating chaotic transportation conditions in the movement of such goods. That such practices are having a depressing influence upon the revenues of the carriers, and if they continue can only result in creating a burden upon other traffic. That the public interest and the preservation of a sound minimum rate structure requires that such practices be stopped and that the privilege accorded by Decision No. 42031 be discontinued."

In support of certain of these allegations, petitioner introduced evidence through various carrier and tariff agent witnesses.

The record does not show that the rates of any of the permit carriers for the handling of government shipments are unlawful, but it does support a finding that certain permit carriers have driven rates for the handling of such shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement of such goods. Such depressed and unreasonably low rates for government traffic are depressing the revenues of the carriers now and previously engaged in handling such traffic and if continued will create a burden upon other traffic.

No evidence was introduced to show that the government is the largest single shipper of commodities moving between points in California, but the record does show that the volume of this traffic is very substantial.

The record further shows that various common carriers and permitted carriers represented at the hearing are willing to continue to offer to the government the freight (all kinds) rates in accordance with the formula arrived

at through negotiation between the representatives of the government and the carriers.

The Commission staff witness made a brief statement respecting the administrative significance of petitioner's proposal. He pointed out that the Commission has previously held in Decision No. 20328, dated October 15, 1928, 32 CRC 296,307, that common carriers are not required to file with this Commission rates quoted under Section 530 of the Public Utilities Code for transportation for the United States, state, county, or municipal governments. In the absence of a filing of such quotations with this Commission practical difficulties will be experienced both by the Commission and its staff and the carriers and the public in ascertaining those quotations which are below the level of the minimum rates otherwise established in Minimum Rate Tariff No. 2.

The Commission staff witness also pointed out a further difficulty. The proposal of the petitioner would place a restriction on the ability of highway permit carriers to initiate lower rates thus leaving the entire initiative to the common carriers. In those instances where closed bids were filed with the government a common carrier could bid below the established minimum rate whereas a highway permit carrier could not safely do so.

In order to meet the administrative problems posed by the Commission staff witness, petitioner suggested (1) that common carriers be required to file copies of their rate quotations governing the transportation of the property for the armed forces of the United States in the same manner that is specified in Tariff Circular No. 2 and General Order No. 80, and (2) that permit carriers

be required to show on their freight bills the source of any rate extended to the armed forces which is below that specified in Minimum Rate Tariff No. 2.

The record shows that the armed forces are required to ship goods via the carriers which offer them the lowest rates. Where several carriers offer the same rates the business is allocated among them on an equitable basis after a review of the schedule of facilities listed by each of the carriers.

Clement T. Mayo, Commerce Counsel representing the Department of Defense, stated the position of Department of Defense as follows:

> "Our position as stated in the opening of the proceeding is that we are appearing as our interests may appear. We are not, based on the evidence that has gone in so far, opposed to the petition as it now stands. We certainly will be opposed to the petition as it was originally filed. Our position in these proceedings and the position we have taken through all the proceedings that we have been in in rate matters is that the Department of Defense is in agreement with the National Transportation Policy as declared by the Congress of the United States and is in favor of reasonable rates on a stabilized basis, and of a sound transportation system to meet the needs of commerce in the national defense. Healthy competition is the life of trade and desirable, particularly in the transportation field. But unethical competition can be extremely detrimental to the industry and can seriously hamper the type of transportation service that is imperative to the defense of our nation and for the waging of war. The Department of Defense seeks rates and rate adjustments only after a thor-

ough analysis of the rate-making factors surrounding the particular transportation involved and after it determines that the existing rates are excessive based on sound rate-making principles and the circumstances of the instant case * * *."

Witness Alves who is president of Alves Service Transportation, Inc., and All-State Transportation, two of the carriers whose volume of governmental traffic has recently been increased by reason of the lowering of rates, stated that he thought the modification of Item No. 20 Series as proposed would be a very fine thing providing there was enough competition in the common carrier field to serve the military bases. Mr. Marioneaux engaged in extensive cross-examination of petitioner's witnesses throughout the hearing and at the conclusion stated that he concurred basically in Mr. Alves' statement. He further stated that he was fully in accord with some corrective measure that would establish minimum rate charges for government traffic as well as for commercial traffic but that he did not believe that the granting of the petition was the proper manner in which to achieve such objective. Mr. Marioneaux suggested that the Commission give this matter further study particularly with respect to assuring the government that there will be a multiplicity of common carriers serving the routes over which military freight is transported.

All other carrier participants in the proceeding, the tariff agents, the California Manufacturers' Association and the Los Angeles Chamber of Commerce were in favor of the modification of Item No. 20 Series as proposed.

The record shows that in those cases where closed bids are sought from carriers and a contract for transportation is awarded by the government to the low bidder it would be manifestly unfair not to allow permit carriers to bid for the business on the same basis as common carriers. If notice of quotations filed by common carriers with the armed forces is given to permit carriers through the filing of such quotations with this Commission prior to their effective date, the permit carriers can compete on an equal basis with the common carriers without the necessity of their being authorized to initiate quotations below the minimum rates specified in Minimum Rate Tariff No. 2. The manner in which quotations from carriers are sought by the armed forces is a matter within the discretion of the armed forces, however.

We hereby find that radial highway common carriers, highway contract carriers and household goods carriers should be permitted to deviate from the minimum rates specified in Minimum Rate Tariff No. 2 only to the extent necessary to meet a lower common carrier quotation to the armed forces of the United States providing said armed forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. Otherwise there should be no limitation on the right of such permit carirers to deviate from said minimum rates in connection with transportation of property for the armed forces of the United States. There is nothing in this record to indicate whether the armed forces of the United States will require common carriers to file such quotations with this Commission and in the absence of such showing we

will not at this time revise the third paragraph of Item 20 Series. However, upon the filing of a supplemental petition for modification herein by the California Government Traffic Conference stating that the armed forces of the United States propose to require common carriers to file with this Commission quotations for the intrastate carriage within California of property for the armed forces of the United States and attaching to said supplemental petition a written statement from the armed forces of the United States expressing such intention, this Commission will issue a supplementary order hereto revising the third paragraph of Item 20 Series to read as set forth in Appendix "A" attached hereto.

ORDER.

Based upon the evidence of record and upon the conclusions and findings contained in the preceding opinion,

It Is Hereby Ordered:

1. That at any time within six months from the date hereof, petitioner California Government Traffic Conference may file a supplemental petition for modification pursuant to the views and suggestion set out in the above opinion, whereupon this Commission will issue a supplemental order herein revising the third paragraph of Item 20 Series of Minimum Rate Tariff No. 2 to read as set forth in Appendix "A" attached hereto and made a part hereof.

2. In the event such supplemental petition for modification is not filed within six months from the date hereof, that Petition for Modification No. 34 be denied without further order of this Commission.

This order shall become effective twenty days after the date hereof.

Dated at Los Angeles, California, this 25th day of January, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Commissioners

Certified as a true copy
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

APPENDIX "A"

(Revised Paragraph 3 of Item 20 Series
Minimum Rate Tariff No. 2)

Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States only to the extent necessary to meet a lower rate of a common carrier for the transportation of said property providing the armed forces of the United States notify this Commission in writing that common carriers are required by them to file such common carrier rates with this Commission in a form acceptable to the Commission, and generally in conformance with the provisions of Tariff Circular No. 2 and General Order No. 80 governing the construction and filing of common carrier tariffs. Radial highway common carriers, highway contract carriers and household goods carriers deviating from the minimum rates named in this tariff pursuant to this paragraph shall make reference on their bills of lading to the common carrier rates on file with this Commission which constitute the authority for such deviation.

In the event the armed forces of the United States do not notify this Commission in writing that common carriers are so required to file such rates with this Commission or revoke any such notice previously given, radial highway common carriers, highway contract carriers and household goods carriers may deviate without limitation from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States."

Appendix "E"

Decision No. 51832

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).	Case No. 5432

SUPPLEMENTAL OPINION AND ORDER.

Decision No. 51831, in this proceeding, issued today, pointed out that amendment of Section 530 of the Public Utilities Code, effective September 7, 1955, changes the conditions under which common carriers may transport property for the United States, state, county or municipal governments. That decision further found that, in view of this statutory change, the rule in Item 20 of Minimum Rate Tariff No. 2, allowing highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the armed forces of the United States, should be canceled.

Therefore, good cause appearing,

It Is Hereby Ordered that Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606 as amended) be

and it is hereby further amended by incorporating therein, to become effective September 7, 1955, First Revised Page 12-A cancels Original Page 12-A, which revised page is attached hereto and by this reference made a part hereof.

In all other respects said Decision No. 31606, as amended, shall remain in full force and effect.

This order shall become effective September 7, 1955.

Dated at San Francisco, California, this 16th day of August, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Rex Hardy
Commissioners

Certified as a true copy
Noel Coleman
Asst. Secretary, Public Utilities Commission
State of California

First Revised Page ..12-A
Cancels
Original Page 12-A

Minimum Rate Tariff No. 2

Item No.	Section No. 1—Rules and Regulations of General Application (Continued)

Application of Tariff—Carriers

Rates provided in this tariff are minimum rates established pursuant to the Highway Carriers' Act and the Household Goods Carriers Act and apply for transportation of property by radial highway common carriers, highway contract carriers and household goods carriers as defined in said Acts.

When property in continuous through movement is transported by two or more such carriers, the rates (including minimum charges) provided herein shall be the minimum rates for the combined transportation.

*20-D
Cancels
20-C

• • •

Rates, rules and regulations named in this tariff shall not apply to transportation by independent-contractor sub-haulers when such transportation is performed for other carriers. This exception shall not be construed to exempt from the tariff provisions carriers for whom the independent contractors are performing transportation service.

*Change
***Paragraph canceled
Decision No. 51832

Effective September 7, 1955

Issued by the Public Utilities Commission
of the State of California, San Francisco, California.
Correction No. 673

Appendix "F"

Decision No. 51922

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Highway Carriers' Tariff No. 2).	Case No. 5432 Petition for Modification No. 34 (Rehearing)

APPEARANCES

Edward M. Berol, Lewis Clark, and *Arlo D. Poe* for California Government Traffic Conference, petitioner.

Arlo D. Poe and *J. C. Kaspar,* for California Trucking Association, Inc. (formerly Motor Truck Association of California); *L. E. Osborne,* for California Manufacturers' Association; *T. A. L. Loretz,* Tariff Agent; *J. L. Beeler,* for Southwestern Motor Tariff Bureau; *Maurice A. Owens,* for Draymen's Association of Alameda County, Pacific Motor Tariff Bureau; *H. L. Matheuson,* for Pacific States Motor Tariff Bureau, Tank Truck Operators Tariff Bureau, and *Elmer Ahl,* Tariff Publishing Agent; *A. F. Schumacher* and *P. N. Kujachich,* for Owens-Illinois Glass Co., Pacific Coast Division; *Jess E. Francis,* for

Continental Freight Lines; *C. R. Nicherson*, for Pacific Coast Tariff Bureau and *T. A. L. Loretz*, Tariff Agent; *Harry Marioneaux, Marquam C. George* and *Walter Alves*, for Alves Service Transportation; *Harry Marioneaux* and *Walter Alves* for All-State Transportation Company; *Harry Marioneaux*, for J. A. Nevis Trucking, Inc.; *Graeme Perton*, for Constructors Transport Co., Inc.; *Harold F. Culy*, for Culy Transportation Co., Inc.; *E. J. Muzio*, for Miles & Sons Trucking Service and Miles Motor Transport System; *John W. Smith*, for Southern Pacific Company and Pacific Motor Trucking Company; *James E. Doyle*, for Doyle Draying Co.; *W. J. Pope*, for Aetna Freight Lines; *Peter Vinick*, for Lodi Truck Service; *S. A. Moore*, for Permanente Cement Co.; and *Leslie C. George* for Leslie C. George, Refrigerated Trucking, interested parties.

Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the U. S. Government; and *Earl S. Williams*, for the Department of Finance of the State of California.

J. A. McCunniff and John W. Mallory, for the Commission's staff.

OPINION AND ORDER.

On May 3, 1955, the Commission issued its order granting rehearing with respect to Decision No. 51047, issued January 25, 1955, herein. On August 16, 1955, and prior to the rehearing the Commission on its own motion issued Decisions Nos. 51831, 51832, and 51833 by reason of amendments to Section 530 of the Public Utilities Code to become effective September 7, 1955. Decision No. 51832 which cancelled the rule in Item 20 of Minimum Rate

Tariff No. 2, allowing highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States, is within the scope of this proceeding.

Public hearings were held before Examiner Cline at San Francisco on August 25, 1955. The matter was taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of Decision No. 51832 and a written request on behalf of Alves Service Transportation to extend the effective date of Decisions Nos. 51831 and 51832. On August 26, 1955, the Department of Defense filed a petition herein to postpone the effective date of Decision No. 51832, and Alves Service Transportation filed a petition for rehearing and extending of effective date of Decisions Nos. 51831 and 51832.

At the hearing the representative for the petitioner, California Government Traffic Conference, stated that nothing further would be offered as Decision No. 51832 satisfactorily handled the matter with which the California Government Traffic Conference had been concerned.

The representative for the Department of Defense stated that in his opinion the minimum rates established in Minimum Rate Tariff No. 2 are not appropriate for the movement of traffic for the Armed Forces of the United States, and unless satisfactory rates for such traffic could be established on an interim basis before September 7, 1955, the effective date of Decision No. 51832 should be extended. The presiding examiner properly ruled that requests for authorization to establish reduced rates for the United States pursuant to Section

530 of the Public Utilities Code, as amended, would be outside the scope of this proceeding and should be the subject of separate petitions. The Department of Defense has requested the Commission to postpone the effective date of Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publications of permitted carriers setting forth the actual rates to be charged the Government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the Government traffic pattern, which are acceptable to this Commission.

The petition of Alves Service Transportation requests that the effective date of Decision No. 51832 be extended for a period of 90 days.

No one opposed the requests for extension of the effective date of Decision No. 51832. However, the representatives for petitioner and the California Manufacturers Association urged that the Commission grant any request for extension of the effective date of Decision No. 51832 only after careful and thorough consideration.

As grounds for the extension of the effective date the Department of Defense in its petition stated:

1. The Department of Defense is one of California's largest shippers.

2. In many instances military installations are outside the immediate boundaries of the commercial zones of large industrial centers. Rates available to commercial shippers in such commercial zones are not available in many instances for the movement of military traffic emanating from and destined to military installations.

3. If Decision No. 51832 is permitted to go into effect as scheduled on September 7, 1955, it will have

a tremendous impact on the movement and distribution of traffic for the Armed Forces and will create chaotic conditions in the movement of such traffic.

4. Military traffic is not a burden on commercial traffic.

5. The Department of Defense favors reasonable rates on a stabilized basis. Class rates are not proper under all circumstances for the movement of military traffic. Military traffic often moves in sufficiently large quantities to entitle it to commodity rates.

6. Rate quotations of carriers for the account of the Armed Forces should be filed with this Commission.

7. The military department should have available to it flexible rate adjustment machinery.

8. In order that military traffic can continue to move by permitted carriers, it is essential that rates of permitted carriers continue to be in written form and to be filed with the Governmental Agencies.

9. The Department of Defense is conducting negotiations with California tariff agencies to modify rate tenders in such a manner as to make them acceptable to the Department of Defense and it is believed that differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated, the Government is opposed to Decision No. 51832 becoming effective.

10. If Decision No. 51832 becomes effective September 7, 1955, after said date and until acceptable permitted carrier tenders are formulated and, where necessary, approved by this Commission, military traffic of necessity will have to be transported by common carriers regardless of the adequacy or inadequacy of their services and the reasonableness of their traffic rates.

At the hearing the representative for the Department of Defense stated that in the opinion of the Department of Defense reparations might be recovered from common carriers for certain military shipments handled at minimum rates or higher, whereas no such reparations could be recovered in similar circumstances from permitted carriers.

After careful consideration of the record the Commission is of the opinion and finds that the effective date of the elimination from Minimum Rate Tariff No. 2 of the rule in Item 20 permitting transportation for the Armed Forces at free or reduced rates should be extended to December 5, 1955, in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended. The petition for rehearing of Decisions Nos. 51831 and 51832 and for extending the effective date of Decision No. 51831 filed by Alves Service Transportation will be the subject of a separate order of this Commission.

Therefore, good cause appearing, it is hereby ordered that:

1. Minimum Rate Tariff No. 2 (Appendix "D" of Decision No. 31606, as amended), be and it is hereby further amended by incorporating therein, to become effective September 6, 1955, except as otherwise provided, Second Revised Page 12-A cancels First Revised Page 12-A and Original Page 12-A, which Second Revised Page 12-A is attached hereto and by this reference made a part hereof.

2. The third paragraph of Item 20 E of Minimum Rate Tariff No. 2 appearing on said Second Revised Page 12-A be and it is hereby cancelled effective December 5, 1955, as shown thereon.

3. In all other respects said Decision No. 31606, as amended, shall remain in full force and effect.

4. Except to the extent herein granted, petition for modification No. 34 to Case No. 5432 is hereby denied.

Paragraphs numbered 1 and 3 of this order shall become effective September 6, 1955, and paragraphs numbered 2 and 4 of this order shall become effective September 26, 1955.

Dated at San Francisco, California, this 6th day of September, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Rex Hardy
Commissioners

Commissioner Ray E. Untereiner Matthew J. Dooley, being necessarily absent, did not participate in the disposition of this proceeding.

Certified as a true copy:
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California.

Second Revised Page..12-A
Cancels
First Revised Page ...12-A
and
Original Page.....12-A Minimum Rate Tariff No. 2

Item No.	Section No. 1—Rules and Regulations of General Application (Continued)

Application of Tariff—Carriers

Rates provided in this tariff are minimum rates established pursuant to the Highway Carriers' Act and the Household Goods Carrier Act and apply for transportation of property by radial highway common carriers, highway contract carriers and household goods carriers as defined in said Acts.

When property in continuous through movement is transported by two or more such carriers, the rates (including minimum charges) provided herein shall be the minimum rates for the combined transportation.

*20-E Cancels 20-D and 20-C

(1) Radial highway common carriers, highway contract carriers and household goods carriers may deviate from the minimum rates named in this tariff in connection with the transportation of property for the armed forces of the United States.

Rates, rules and regulations named in this tariff shall not apply to transportation by independent-contractor sub-haulers when such transportation is performed for other carriers. This exception shall not be construed to exempt from the tariff provisions carriers for

whom the independent contractors are performing transportation service.

*(1) The provisions of this paragraph are canceled effective December 5, 1955.

*Change, Decision No. 51922

Effective September 6, 1955
(Except as otherwise provided.)

Issued by the Public Utilities Commission
of the State of California, San Francisco, California.
Correction No. 674

Appendix "G"

Decision No. 52287

Before the Public Utilities Commission
of the State of California

In the Matter of the Investigation into the rates, rules, regulations, charges, allowances and practices of all common carriers, highway carriers and city carriers relating to the transportation of general commodities (commodities for which rates are provided in Minimum Rate Tariff No. 2).	Case No. 5432 (Petition No. 34) (First Supplemen

SUPPLEMENTAL OPINION AND ORDER

By Decision No. 51832 of August 16, 1955, following amendments to Section 530 of the Public Utilities Code, the rule in Item No. 20 of Minimum Rate Tariff No. 2, which allowed highway permit carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States, was canceled. Following representations of the Department of Defense and other interested parties, the effective date of the cancellation of the tariff rule was postponed to December 5, 1955, in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to es-

tablish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended (Decision No. 51922, dated September 6, 1955, in this proceeding).

By petition filed November 21, 1955, the Department of Defense seeks a further 60-day postponement. The petitioner avers that it has attempted diligently and in good faith to meet the December 5 date, but that because of the magnitude of the task it is unable to do so.

By the amendment to Section 530 of the Public Utilities Code, which was enacted by the legislature and became effective September 7, 1955, the general right of common carriers to transport property for government agencies at free or reduced rates was removed, subject to such exceptions as the Commission may consider just and reasonable. The provisions of Item No. 20 of Minimum Rate Tariff No. 2 which permits carriers to deviate from the minimum rates in connection with the transportation of property for the Armed Forces of the United States constitutes an exception which was established prior to the amendment of Section 530. So long as this provision remains in effect, not only the permitted carriers but also the common carriers are without the rate regulation which clearly was contemplated under the recent legislative enactment. (See Decision No. 51831 dated August 16, 1955, in Case No. 5432.) As hereinbefore stated, the Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed to the Commission for its consideration.

The intent of the legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable.

Therefore, good cause appearing,

It Is Hereby Ordered, that first supplemental petition for Modification No. 34, in Case No. 5432, filed November 21, 1955, by the Department of Defense, be and it is hereby denied.

This order shall become effective twenty days after the date hereof.

Dated at San Francisco, California, this 29th day of November, 1955.

Peter E. Mitchell
President
Justus F. Craemer
Ray E. Untereiner
Matthew J. Dooley
Commissioners

Certified as a true copy:
Noel Coleman
Assistant Secretary
Public Utilities Commission
of the State of California

19

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLANT.

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J. THOMASON PHELPS,
Senior Counsel,
WILLIAM R. ROCHE,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR THE APPELLANT.

OPINION BELOW.

The opinion of the District Court (R. 200-237) is reported at 141 F. Supp. 168.

JURISDICTION.

The judgment of the three-Judge District Court was dated and entered on June 5, 1956 (R. 256-257). Notice of

Appeal was filed in that Court on July 31, 1956 (R. 257). The jurisdiction of this Court rests on 28 U.S.C. Secs. 1253 and 2101(b).

QUESTIONS PRESENTED.

I. Preliminary or Threshold Question.

Did the District Court have jurisdiction to entertain the complaint?

A. Did the complaint allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201?

B. Did the Plaintiff (Appellee) fail to exhaust the administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California;

C. Did the complaint involve a matter which is within the primary jurisdiction of the Pulbic Utilities Commission as an administrative agency of the State of California?

D. Was the District Court prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff (Appellee)?

E. Did the complaint allege facts showing irreparable injury to the Plaintiff (Appellee) in the absence of injunctive relief?

F. Did the Plaintiff (Appellee) have an adequate remedy elsewhere than in the District Court?

G. Was the District Court required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the

Government of the United States and that of the State of California?

II. Evidentiary Questions.

A. Did the District Court err in overruling Defendant's (Appellant's) objections to questions calling for expressions of opinions by Plaintiff's (Appellee's) witnesses upon the ultimate issues in the case?

B. Did the Plaintiff (Appellee) prove at the trial, by a preponderance of the evidence, that it would suffer irreparable injury in the absence of injunctive relief?

III. Ultimate Question.

Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

STATUTES, ETC., INVOLVED.

This appeal involves the validity of California Statutes of 1955, Vol. 2, p. 3608, Chapter 1966 (California Public Utilities Code, Section 530, as amended) which is as follows (the words shown below as stricken were deleted, and those shown in italics were added, by the 1955 amendment.):

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> "(a) Persons ~~or property~~ for the United States, state, county, or municipal governments, or *persons*

or property for charitable or patriotic purposes, or to provide relief in cases of general epidemic, pestilence, or calamity.

"(b) Property to or from fairs or expositions for exhibit thereat.

"(c) Contractors and their employees, material or supplies for use or engaged in carrying out their contracts with such carriers, for construction, operation, or maintenance work or work incidental thereto on the line of the issuing carrier, to the extent only that such free or reduced rate transportation is provided for in the specifications upon which the contract is based and in the contract itself.

"Common carriers may also enter into contracts with telegraph and telephone corporations for an exchange of service.

"The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers as defined in the Highway Carriers' Act."

This appeal also involves the following portions of the Constitution of the United States (set out in Appendix A attached hereto): Article I, Section 8, Clause 3 (Interstate Commerce), Clause 12 (Support Armies), Clause 13 (Maintain Navy), Clause 16 (Militia), Clause 17 (Forts,

etc.), Clause 18 (Make Laws to Execute Powers); Article III, Section 2, Clause 1 (Judicial Power); Article IV, Section 3, Clause 2 (Rules re Property of United States); Article VI, Clause 2 (Supreme Law of Land); Amendment 10 (Powers Reserved to States); Amendment 14, Section 1 (Due Process).

Also involved are the following Federal statutes (pertinent portions of which are set out in Appendix B attached hereto): 28 U.S.C., Section 1342 (62 Stat. 932) (Johnson Act); 28 U.S.C., Section 2201 (68 Stat. 890) (Declaratory Relief); 49 U.S.C., Section 22 (58 Stat. 751) (Interstate Commerce Act); 10 U.S.C., Sections 2301-2314 (70A Stat. 641); 40 U.S.C., Sections 471 (68 Stat. 1126), and 481(a)(4) (64 Stat. 591) (Federal Property and Administrative Services Act of 1949, as amended).

Reference will also be made to certain provisions of the California Constitution, to additional sections of the California Public Utilities Code, and to provisions of certain minimum rate tariffs established by the Commission, (pertinent portions of which are set out in Appendix C attached hereto) as follows: California Constitution, Article XII, Section 22, California Public Utilities Code Sections 211(d), 213, 215, 216(a), 486, 493, 494, 530, 1733, 1756, 1757, 1761, 1762, 1763, 1764, 3502, 3511, 3571, 3663, 3664, 3666, 3737, 3738, 3739, 3740, 3942, 4013, 5133, 5192 and 5193; Minimum Rate Tariff No. 2, Items 20, 30, 40 and 41 Series.

STATEMENT OF THE CASE.

Preliminary Comment.

This is an appeal by the Public Utilities Commission of the State of California (hereinafter called the Commission) from a judgment of a three-Judge United States District Court for the Northern District of the State of California, Southern Division, declaring a statute of the State of California to be unconstitutional and therefore null and void, and permanently enjoining the Commission from taking any action thereunder. The statute thus nullified would have withdrawn from commercial carriers the right theretofore existing to transport property of the United States and other governmental subdivisions between points in California free or at reduced rates, and would have empowered the Commission to authorize such rates upon such terms and conditions as it should consider just and reasonable.

Before narrating chronologically the events leading up to the present action and in order to make some of those events intelligible, it appears desirable to describe briefly the constitutional, statutory and administrative framework within which commercial carriers in California are regulated.

The Commission is a body duly constituted, and has its jurisdiction prescribed, by the Constitution and statutes of the State of California, for the purpose, among others, of regulating the intrastate rates of commercial carriers for transportation of property between points in the State of California. (California Constitution Art. XII, Section 22; App. C, p. 30).

Commercial carriers of property are of various kinds, and, for purposes of regulation, can be classified in various ways. In California, for this purpose, they are classified by the physical facilities or medium employed, such as rail, motor vehicle, water or air; and motor vehicle carriers are further classified by whether they are common or contract (private) carriers, by the type of commodity transported, and by the pattern or magnitude of their operations. The Commission's authority to regulate motor vehicle carriers is contained in several distinct Acts embodying various grants of power by the Legislature, from time to time, affecting various kinds of carrier. This distinction between kinds of carrier and between the legislatives Acts under which they are regulated is important in understanding some of the events leading up to this case.

Thus, if a motor common carrier operates "between fixed termini or over a regular route," it is defined as a public utility by the Public Utilities Act, and as such is subject, like rail and water common carriers, to regulation under the Public Utilities Act. (California Public Utilities Code, Sections 211(d), 213, 215, 216(a); Appendix C, pp. 30, 31.) As such public utility, it is required to obtain from the Commission operating authority in the form of a certificate of public convenience and necessity. It is generally called a "certificated carrier." Such carrier is required by law to file tariffs (Public Utilities Code, Sections 486, 493; Appendix C, p. 31), and is prohibited (with certain exceptions) from assessing or collecting charges other than those named in its tariff (Public Utilities Code, Section 494; Appendix C, p. 31).

Other motor vehicle carriers, operating beyond the boundaries of a single incorporated city or town, but not over a regular route, nor between fixed termini, are regulated by the Commission pursuant to the Highway Carriers' Act; others, operating exclusively within the boundaries of an incorporated city or town, are regulated under the City Carriers' Act; and still others under the Household Goods Carriers' Act.[1] These classes of carrier are required to obtain merely a permit from the Commission for their operating authority (Public Utilities Code, Sections 3571, 3942, 5133; Appendix C, pp. 36-38), and are generally called "permit carriers." They are required by law to assess and collect charges no less than those established by the Commission as minimum (Public Utilities Code, Sections 3664, 4013, 5193; Appendix C, pp. 36, 38). For the purpose of regulating these types of carrier, the Commission, from time to time, has established and promulgated minimum rate orders in the form of tariffs.

Generally, although by no means invariably, the operations of the certificated carriers are on a larger scale than those of the permit carriers, and they are somewhat more firmly established financially.

Although certificated and permit carriers have different kinds of operating authority, and in other ways are regulated somewhat differently one from the other, they compete vigorously with each other for nearly all kinds of

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[1]All of these Acts are codified in the Public Utilities Code—the Highway Carriers' Act being Sections 3501-3809 thereof, the City Carriers' Act being Sections 3901-4149, and the Household Goods Carriers' Act being Sections 5101-5319.

increased" (R. 8); that in the event it should be determined that the State of California had no authority to regulate rates for the transportation of property of the United States, the United States could not be compensated by bond or otherwise for the increased expense which would have resulted to it during the period in which the statute was in force; and that enforcement of Section 530 of the Public Utilities Code might jeopardize the national security.

The complaint requested that a three-judge Court be convened pursuant to section 2284(1) of Title 28 of the United States Code; that the District Court grant a temporary restraining order and an interlocutory injunction to prevent and prohibit the Commission from enforcing or attempting to enforce said sections of the Public Utilities Code until the complaint was finally heard and determined; that upon final hearing judgment be entered declaring that insofar as Section 530 of the Public Utilities Code of the State of California and related provisions (unspecified) prohibit carriers within the State from transporting property of the United States at rates other than those approved by the Commission, they are unconstitutional and void, and that the Commission "be permanently enjoined from making any effort to prohibit the carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers . . ." [sic] (R. 9).

business; and they both compete with other forms of transportation, such as that furnished by the rails.

In order to equalize the conditions under which the certificated carriers and certain permit carriers compete with one another, there has been for many years a provision in the Highway Carriers Act prescribing in effect that the minimum rates established by the Commission for the regulation of permit carriers subject to that act shall not exceed the rates of rail or certificated motor carriers. (Public Utilities Code, Sec. 3663; App. C, p. 36.)[2]

In order further to equalize the conditions surrounding the competition for government traffic (at least the largest part of it, namely, Armed Forces traffic in so-called "general commodities"), the Commission, as a matter of policy, for a number of years prior to 1955, included in its minimum rate tariff applicable to general commodities, a special provision whereby permit carriers were allowed to "deviate from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States.". (Min. Rate Tariff No. 2, Item 20 Series, para. 3, Items 40 and 41 Series; App. C. pp. 38, 39.)[3]

In exercising the privilege thus made available to carriers to deviate from established rates in transporting property of the United States, it was the practice of car-

[2]A similar provision is contained in the Household Goods Carriers' Act, Public Utilities Code, Sec. 5192, App. p. 38.

[3]The limitation of this privilege to "Armed Forces" traffic in general commodities had significant consequences, as will appear later.

Proceedings in the District Court.

The Commission filed in the District Court a motion to dismiss the complaint on the grounds that the District Court had no jurisdiction over the subject matter of the complaint, and that the complaint failed to state a claim upon which relief could be granted (R. 15, 16). The questions raised by this motion were comprehensively briefed and argued before the District Court (R. 21-138, 198). The motion was denied (R. 198). Thereafter the Commission filed its answer (R. 199), and the case was set for trial on the merits. The trial that followed continued for a week. Twelve witnesses were called by the Government. Nine of these witnesses were military officers of the Armed Forces, having duties with respect to the procurement of transportation for Government property, and their civilian assistants (R. 369, 432, 495, 506, 530, 555, 562, 568, 597). Two other Government witnesses were representatives of railroads (R. 478, 584). One witness sought to testify upon matters related to the jurisdiction of the United States over certain military reservations in California. (R. 615-618). Over objection by counsel for the Commission, many of these witnesses were allowed to express their opinion that regulation of rates by the Commission would impede and interfere with the transportation of property of the United States (R. 382, 383, 447, 482, 483, 502, 530, 531, 560, 564). As reasons for their conclusion, they said in substance that regulation would result in increased cost to the United States (R. 384, 448, 513, 514, 531, 561, 574); that it would cause delays in shipments of property of the United States (R. 450, 505, 513); that it would impair the military security of the United States (R. 384, 450-452, 561); that it would

riers either themselves to file with government agencies so-called special rate tenders (R. 627), or to participate in such tenders prepared by tariff agents and by them filed with the Federal Government agencies (R. 626, 627).

Chronological Narration of Facts.

It will now be appropriate to narrate chronologically the pertinent events involved in this appeal.

On June 3, 1954, a group of carriers, organized into an unincorporated association called the "California Government Traffic Conference," who are engaged in the transportation of property for the Armed Forces of the United States, filed with the Commission a petition proposing the elimination of the tariff provision above referred to allowing permit carriers to deviate from minimum rates. (This petition is set out in full in the record, pages 116-118). It is stated, in substance, that the United States Government is the largest single shipper of commodities moving between points in the State of California; that carriers transporting property of the United States between such points were assessing therefor unreasonably low and depressed rates; and that such practices were creating chaotic transportation conditions in the movement of such goods, were having a depressing influence upon the revenues of carriers, and, if continued, would result in creating a burden on other traffic. The petition further recited that "the public interest and the preservation of a sound minimum rate structure requires that such practice be stopped and that the privilege [to deviate from minimum rates for Armed Forces traffic] be discontinued." The petition requested that the matter be set for public

be difficult to distinguish between interstate and intrastate traffic (R. 383, 441, 514); that the present system of procuring transportation for Government property is a good system (R. 422, 575), although attended by certain abuses that result in depressed rates (R. 422, 479); and that the very existence of state power would be onerous (R. 409, 413).

When the United States had rested the Commission renewed its motion to dismiss. The motion was again denied (R. 619).

One of the witnesses called by the Commission was its Director of Transportation (R. 683). He testified in substance that he recognized in Section 530 of the Public Utilities Code a legislative policy to give the United States Government preferential treatment (R. 687); that he would so advise the Commission (R. 687); that he saw no reason why special commodity rates could not be established for the United States upon a proper showing (R. 688); that it could be done expeditiously and without a public hearing (R. 689, 693); that he saw no reason why regulation of rates by the Commission would cause delays in the movement of military traffic (R. 689); that the Commission could authorize rates for Government traffic to be made effective retroactively, that is, after moves had taken place (R. 689); and that with respect to traffic involving military security, he would recommend a general order exempting such traffic from regulation (R. 689, 690).

The Commission's Chief Counsel stipulated on the record that he would officially advise the Commission that it has lawful authority under California law to authorize any carrier to negotiate with the United States with con-

hearing and that the Commission take appropriate steps to grant relief.[4]

On June 17, 1954, an amendment to this Petition for Modification No. 34 was filed by the California Government Traffic Conference. In this amendment the original request to eliminate the special tariff provision was modified into a request that this provision be changed so as to allow permit carriers to deviate from the minimum rates "to the extent necessary to meet the rate of common carriers [i.e., rail or certificated motor carriers], on file for use with the Armed Forces of the United States, pursuant to Section 530 of the Public Utilities Code."

A prehearing conference and public hearings were held upon the amended petition, at all of which counsel appeared for the interested agencies of the United States (R. 120, 121, 82, 83).

On January 25, 1955, the Commission issued its decision (No. 51047) upon this amended petition. (This decision is set out in full in the record at pages 81-90.) In it the Commission found that "certain permit carriers have driven rates for the handling of [U. S. Government] shipments to a depressed and unreasonably low level, thereby creating chaotic transportation conditions in the movement

[4]This petition was filed in Case No. 5432 as "Petition for Modification No. 34." Case No. 5432 is one of those continuing proceedings contemplated by Section 3738 of the Public Utilities Code (Appendix C, p. 37). It was originally commenced by the Commission on its own motion and is the proceeding in which the Commission established the basic minimum rate tariff for general commodities, this tariff being designated as Minimum Rate Tariff No. 2. From time to time various interested parties file petitions requesting modification of this basic rate order, and such a petition is usually entitled and docketed by the Commission as "Petition for Modification No. ....."

plete freedom concerning the transportation of any property of the United States which may involve security matters if a responsible federal official certified that such transportation involved security (R. 700); and that the Commission has authority to authorize special rates under Section 530 of the Public Utilities Code without a public hearing and to make such rate authority effective immediately (R. 701).

The matter was orally argued on April 19, 1956, at which time the Commission again renewed its motion to dismiss, and also argued the ultimate question (R. 704, 724-737). Eleven days later, on April 30, 1956, the District Court handed down a 40-page memorandum decision in favor of the Government, wherein the District Court stated its reasons for its ultimate decision as well as for its denial of the Commission's motion to dismiss the complaint (R. 200-237). The Government's counsel was directed to prepare proposed findings of fact, conclusions of law, and a form of judgment (R. 237).

Summary of Findings by District Court.

Fifteen pages of findings (R. 240-253) were so proposed and adopted by the District Court. In substance, they were that there is a large volume of military traffic in California; that this traffic is different from commercial traffic; that some of it moves from and to installations situated on land ceded by the State of California to the United States; that rate regulation by the Commission would increase the cost of transportation to the Government, would require additional personnel, and would cause delays in the shipment of Government property; that due

to the flow of military materiel through the Government's depot system "it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character" (R. 250); that it would be necessary to segregate materiel within the various depots and in trucks and rail cars in accordance with its origin or destination, resulting in "delays, increased man hours of work on the part of military personnel, friction and possible litigation" (R. 250); that regulation of rates by the Commission would jeopardize the security of the United States; that the United States might have to relocate its depot system; that its officers would choose interstate rather than intrastate routes for its traffic to the prejudice of carriers in California; that the foregoing objections to regulation would be multiplied in case of war; that officers of the United States would be subject to criminal prosecution for violations of the Public Utilities Code or regulations of the Commission; and that "the transportation industry in California is in a healthy economic condition." (R. 252)

Conclusions of Law of the District Court

The conclusions of law (R. 253-256) proposed by counsel for the Government and adopted by the District Court were in substance that it had jurisdiction over the cause and the parties thereto; that the complaint stated a claim upon which relief could be granted; that the complaint described an actual controversy within the meaning of 28 U.S.C., Section 2201; that "for no valid reason within the police powers or other reserve powers of the State of

of such goods. Such depressed and unreasonably lo rates for government traffic are depressing the revenue of the carriers now and previously engaged in the han dling of such traffic and if continued will create a burde upon other traffic."

The Commission also found in this opinion that permi carriers "should be permitted to deviate from the mini mum rates specified in Minimum Rate Tariff No. 2 onl to the extent necessary to meet a lower common carrie quotation to the Armed Forces of the United States pro viding such Armed Forces give notice to this Commissio that they require common carriers to file such quotation with this Commission prior to their becoming effective Otherwise there should be no limitation on the right o such permit carriers to deviate from said minimum rate in connection with transportation of property for the Armed Forces of the United States."

It was also stated that "there is nothing in this record to indicate whether the Armed Forces of the United States will require common carriers to file such quotations with this Commission and in the absence of such showing we will not at this time revise the third paragraph of Item 20 Series. However, upon the filing of a supplemental peti tion for modification herein by the California Government Traffic Conference stating that the Armed Forces of the United States propose to require common carriers to file with this Commission quotations for the intrastate car riage within California of property for the Armed Forces of the United States and attaching to said supplemental petition a written statement from the Armed Forces of the United States expressing such intention, this Commis-

sion will issue a supplementary order hereto revising the third paragraph of Item 20 Series to read [in such a way as to authorize permit carriers to] deviate from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States only to the extent necessary to meet a lower rate of a common carrier for the transportation of said property providing the Armed Forces of the United States notify this Commission in writing that common carriers are required by them to file such common carrier rates with this Commission in a form acceptable to the Commission. . . . In the event the Armed Forces of the United States do not notify this Commission in writing that common carriers are so required to file such rates with this Commission or revoke any such notice previously given, [permit carriers] may deviate without limitation from the minimum rates named in this tariff in connection with the transportation of property for the Armed Forces of the United States."

On March 11, 1955, the petitioner, California Government Traffic Conference, filed with the Commission a Petition for Reconsideration, Modification or Rehearing with respect to said Decision No. 51047 (R. 128-135). This petition recites, among other things, that "representatives of your petitioner have discussed with the Armed Forces the decision of your Commission and have requested of the Armed Forces that the Armed Forces give notice to this Commission that they require common carriers to file such quotations with this Commission prior to their becoming effective. *Your petitioner has been unsuccessful in its endeavors to cause the Armed Forces to give*

California, the application of Section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense," (R. 254); and that regulation of rates for the shipment of military materiel would be unconstitutional and void in the absence of any act of Congress; that by Section 22 of the Interstate Commerce Act, 24 Stat. 387 (49 U.S.C. 22), the Armed Services Procurement Act, 41 U.S.C. 151(c) [62 Stat. 21-26], and the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, Sections 201 and 202 [40 U.S.C. 471, 481, 483], Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be free of regulation; that *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, is inapplicable to this case for the reasons that under the regulation involved in the *Penn Dairies* case there would be no direct interference with the officers of the United States in the discharge of their responsibilities, no delays or increased administrative burden or revelation of secret matter in the procurement of the items of supply there involved, and that the regulation of the price of milk by a State is related to the health of the population of the State; that the stipulation of counsel for the Commission that regulation by the Commission will not require the furnishing of secret information and that such regulation will involve a minimum burden on the United States, though made in utmost good faith, was irrelevant; that insofar as Section 530 of the Public Utilities Code of the State of California

purports to authorize the Commission to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers for the transportation of property of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, Section 8, Clauses 11, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; and that if said Section 530 should be applied to the United States, it would suffer irreparable injury, and that the United States had no adequate remedy at law.

Judgment of the District Court.

On June 5, 1956, the District Court entered judgment in the form proposed by counsel for the Government (R. 256, 257), by which it ordered, adjudged and decreed as follows:

> "1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose 'such conditions as it may consider just and reasonable' upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, section 8, clauses 11, 12, 13, 16 and 17, and Article IV, section 3, clause 2, of the Constitution of the United States.
>
> "2. Defendant Public Utilities Commission of the State of California and its agents and employees are hereby permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements

such notice to your Commission, and your petitioner has been informed that the Armed Forces do not feel it is appropriate for them to give such a notice to your Commission and that they will not give such a notice to your Commission.'' (Emphasis added throughout unless otherwise indicated.)

On May 3, 1955, the Commission granted a rehearing with respect to said Decision No. 51047 "to be held . . . at such time and place as may hereafter be designated." (R. 123-124).

Thereafter, in July 1955, the California Legislature amended Section 530 of the Public Utilities Code. An examination of this statute as amended, supra, (pp. 3, 4), shows that its effect was to withdraw from carriers subject to the Public Utilities Act (i.e., rail carriers, certificated motor carriers, and other carriers named in said Act), the privilege of transporting property for the United States and local governments free or at reduced rates, and empowered the Commission to permit reduced rates to such extent and subject to such conditions as it considers just and reasonable. This amendment was to become effective September 7, 1955.

It should be noted, however, that the amended statute contains a provision for continuing the privilege to the carriers subject to regulation under the Public Utilities Act to the extent necessary to enable them to meet any rates of other such carriers or rates allowed to the permit carriers. This proviso in the statute was obviously intended to prevent rival carriers from obtaining any competitive advantage over the carriers subject to the

with respect to rates for the transportation of property of the United States."

Notice of appeal from this judgment was filed in the District Court on July 31, 1956 (R. 257).

SUMMARY OF ARGUMENT.

I. Preliminarily, the District Court should not have entertained the action, but should have granted the Commission's motion to dismiss.

(A) The complaint did not describe an "actual controversy" within the meaning of the Declaratory Judgment Act, nor can it be determined who are the adversary parties. The Commission was named as the sole defendant, but there is not a single word in the complaint alleging that the defendant Commission had done, or was about to do, or had threatened to do, anything whatever adverse to the United States, or to any of its officers or agents; nor any allegation of any circumstance giving rise to a duty in the Commission to do any such adverse act, and to the probability thereof. The only adverse act alleged in the entire complaint is an act of the California Legislature, viz., that "in July, 1955, the Legislature amended Section 530 of the Public Utilities Code and deleted" certain parts thereof. The United States then alleged that "the application of Section 530 of the Public Utilities Code as amended to shipments made by it would" have certain prejudicial consequences. But there is no allegation that the Commission had applied, or was about to apply, or had threatened to apply said Section 530 to shipments made

Public Utilities Act. This proviso therefore had the effect of nullifying the withdrawal of the privilege, that is to say, it restored the privilege in part, so long as, and to the extent that, permit carriers were authorized to deviate from the minimum rates when transporting general commodities for the Armed Forces.

On August 10, 1955 a notice was sent to all interested parties giving notice of a rehearing on August 25, 1955, with respect to said Decision No. 51047 (i.e., the decision above referred to issued January 25, 1955 on Petition for Modification No. 34) (R. 114).

On August 16, 1955, the Commission, in order to give effect to the Legislature's intent to lodge discretion in the Commission, cancelled the provision of the minimum rate order above described (Item 20 in Minimum Rate Tariff No. 2) that allowed permit carriers unlimited authority to deviate from the minimum rates for the transportation of general commodities for the Armed Forces. This decision by its terms was to become effective on September 7, 1955, contemporaneously with the amendment to Section 530 of the Public Utilities Code (Decision No. 51832 in Case No. 5432; R. 90-92).

This decision, in conjunction with said amendment, was calculated to have the effect of withdrawing from all commercial carriers the previously enjoyed right to deviate from established rates in transporting property of the United States.

On August 25, 1955, a public hearing was held pursuant to the above described Notice of Hearing with respect to said Decision No. 51047 upon Petition for Modification

by the United States, or that it would administer the statute in an unlawful or burdensome way; nor is there any allegation of any circumstance giving rise to a duty in the Commission so to apply said section as amended, and a probability that the Commission would apply it.

These defects in the complaint were not merely formal, but were symptomatic of fundamental objections to declaratory and injunctive relief for purposes of this case, objections that are disclosed when this case is viewed in the light of *Public Service Commission of Utah v. Wycoff Co.* (1952), 344 U.S. 237, 97 L. ed. 291, and *Alabama State Federation of Labor v. McAdory* (1944), 325 U.S. 450; 89 L. ed. 1725. Such relief involved a futile and premature intervention in a field of public law; the conflict of interest between the United States and the State of California was not ripe for determination, but was nebulous and contingent; instead of quieting controversy the ruling sought (and granted) was calculated to confuse, and to stir up litigation; it did extreme violence to the Federal-State relationship; and there has been no authoritative construction of the statute by the state courts.

(B) The complainant failed to exhaust an administrative remedy available to it. It was a party to a proceeding before the Commission involving the power of the Commission to regulate the intrastate rates of commercial carriers for the transportation of property of the United States between points in California. Under the law of California, the United States had available to it an adequate and speedy means of obtaining judicial review, first by the Supreme Court of California and finally by this Court, of the Commission's decision exercising

No. 34, at which the appearance of "Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the U. S. Government" was entered. The matter was "Taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of Decision No. 51832 . . ." (Decision No. 51922; R. 94).

On August 26, 1955, the Department of Defense of the United States Government, pursuant to such reservation, filed with the Commission a petition to postpone the effective date of said Decision No. 51832 (R. 104-109). Among other things, this petition states (paras. 9 and 10):

> "9. That certain present rate tenders which have been effective for both permitted and common carriers contain rules and other provisions which are non-acceptable to the military establishment, which establishment is presently conducting negotiations with California tariff agencies to modify these rate tenders in such a manner to make them mutually acceptable. There is very little difference in the views of some of these agencies with those of this department, and *it is believed that such differences can be resolved within a relatively short time. Until such time as mutually acceptable tenders are negotiated*, however, the Government is opposed to Decision No. 51832 becoming effective.
>
> 10. That if said order becomes effective as scheduled, after September 7, military traffic of necessity will have to be transported by common carriers regardless of the adequacy or inadequacy of their services and the reasonableness or unreasonableness of

that power. Such a review would have permitted the Supreme Court of California to interpret authoritatively the meaning and scope of Section 530 of the Public Utilities Code as amended, and to pass upon its constitutionality; and would have afforded this Court an opportunity to review the California Court's judgment if the United States were aggrieved thereby. And the effectiveness of the Commission's action under the statute could have been stayed pending such review. The United States, however, acquiesced at first in the Commission's exercise of that power, seeking merely, and obtaining, a postponement of its effect, and representing to the Commission that new rates acceptable to the United States, the carriers, and the Commission, could be negotiated in a relatively short time. The United States thus waived its right under California law to obtain judicial review. The United States then changed its mind, and at the eleventh hour sought to nullify the Commission's action in the Federal Court.

Moreover, the United States had available to it, by appropriate proceedings before the Commission, an administrative remedy by means of which it could avoid all the evils alleged in the complaint, including unreasonable costs of transportation, delays of Government shipments, and violations of national security.

(C) The complaint alleged that certain rates established for other shippers are "unrealistically high" when applied to shipments of the United States. This allegation in effect sought a finding pertaining to the reasonableness of such rates for Government shipments. Such a finding, however, calls for the exercise of an informed

their traffic rates until acceptable permitted carrier tenders are formulated *and approved*, if they deviate from the Public Utilities Commission rates."

The petition concludes with the following prayer:

"WHEREFORE, the Department of Defense respectfully urges that your Commission postpone the effective date of Decision No. 51832 for a period of 90 days or until: (a) acceptable rate publication of permitted carriers setting forth the actual rates to be charged the government can be formulated, and (b) reasonable and acceptable carrier tenders can be negotiated to fit the government traffic pattern, which are *acceptable to your Commission.*"

On September 6, 1955, the Commission issued a new decision by which it ordered that "The third paragraph of Item 20E of Minimum Rate Tariff No. 2 . . . is *hereby* cancelled effective December 5, 1955 . . ." (Decision No. 51922 in Case No. 5432; R. 93-99). The opinion states (R. 97):

"After careful consideration of the record, the Commission is of the opinion and finds that the effective date of the elimination from Minimum Rate Tariff No. 2 of the rule in Item 20 permitting transportation for the Armed Forces at free or reduced rates should be extended to December 5, 1955 in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended."

By a petition filed November 21, 1955, the United States Department of Defense sought a further 60-day postponement (R. 110-114).

On November 29, 1955, the Commission denied this request for further extension (Decision No. 52287, in Case No. 5432; R. 100-101). In this decision the Commission stated:

> ". . . The Commission has once postponed the cancellation of this provision for a period of 90 days upon representations that during such period satisfactory rate arrangements would be negotiated and proposed to the Commission for its consideration.
>
> "The intent of the Legislature should be carried out without further delay. Accordingly, the petition for further postponement will be denied. *This action will in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable.*"

As a result, the cancellation of the tariff provision was to become effective at 12:01 A.M. on December 5, 1955, which was a Monday. The effect would have been to deprive all commercial carriers of the privilege of transporting Armed Forces general commodities free or at reduced rates. On the afternoon of the preceding Friday, December 2, 1955, the complaint in this proceeding was filed, and a temporary restraining order, an interlocutory injunction, and a permanent injunction were requested, together with certain declaratory relief pursuant to Title 28, Section 2201 of the United States Code. The complaint appears in the Record at pages 1-9.

The prayer for injunctive relief was that the District Court "grant a temporary restraining order and an interlocutory injunction and all appropriate process necessary to prevent and prohibit the Public Utilities Commission of the State of California from enforcing or attempting to enforce said provisions of the Public Utilities Code, as amended, until this cause is finally heard and determined on the merits;" and that "the Public Utilities Commission of the State of California be permanently enjoined from making any effort to prohibit the carriers within the State from negotiating and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers . . ." (sic).

In the afternoon of Friday, December 2, 1955, when the complaint was filed, counsel for the plaintiff (Appellee, hereinafter called the "United States" or "Government") applied to the District Court for a temporary restraining order. In the course of his argument he said:

> "The Public Utilities Commission has by order implemented this Section 530 of its Public Utility Code, and that order is to take effect at 12:01 a.m. on Monday, December 5th, so that if action is not taken as of today the section will be in effect as of a minute after midnight on Sunday." (R. 265).

The Commission was given an opportunity to be heard upon the question of whether the proposed restraining order should issue; and its counsel pointed out that "The Commission has already issued certain orders which,

merely by the lapse of time and complete inaction by the Commission, will become effective as of 12:01 Monday morning; . . . To put it another way, the carrier industry and the government . . . have had ninety days within which to prepare for the effectiveness of this order which the Commission has already entered. So that, as I say, if the Commission does nothing, that order will become effective; . . . Moreover, the Commission presumably, if it sought to comply with this Court's order, would have to convene and sign out a new order countermanding its present order, and give notice to thousands of carriers in the industry countermanding its present order." (R. 268, 269).

The following colloquy also took place:

"Mr. PHELPS: Yes. Well, my position is, Your Honor, what can the Commission do or what will Your Honor expect the Commission to do in compliance with the restraining order: Who is going to be restrained from doing what? That's what is not clear to me.

"THE COURT: The Public Utilities Commission, by the language of the temporary restraining order, I believe is restrained from carrying this order into effect.

* * * * * * * *

"That is all that this order does, would be to say to the Public Utilities Commission, 'Stay it. Stay it for an additional period of time,' and that will maintain the status quo, and I don't see any particular inequity in that. * * *

"MR. PHELPS: And do I understand, Your Honor, that you construe the order, which I have not yet seen, to mean that the Commission is to take

immediate or all reasonably practicable steps to abate, so to speak, the effectiveness of that order?

"THE COURT: I do. I do, yes. I don't want to be equivocal about that at all.

"I am going to do everything in my power to see that it is carried out." (R. 272, 273, 281).

Thereafter, in the *afternoon* of December 5, 1955, the Commission issued a decision to become "effective on the date hereof," in which it was ordered that "the cancellation of the third paragraph of Item 20E of Minimum Rate Tariff No. 2 is hereby suspended until final disposition of the case of United States of America, Plaintiff vs. Public Utilities Commission of the State of California, Defendant, Civil Action No. 35101, now pending in the United States District Court for the Northern District of California, Southern Division, and until the further order of the Commission." (Decision No. 52317 in Case No. 5432; R. 102-104).

Summary of Complaint.

The 9-page complaint (R. 1-9) alleged in substance that the United States has established numerous civil and military installations in the State of California; that some of these installations are situated on land ceded by the State of California to the United States and are under the exclusive jurisdiction of the United States; that property of the United States moving in intrastate commerce is commingled in the depot system maintained by the United States with property moving in interstate and foreign commerce; that it has been the practice of the United States to negotiate special rates with common

carriers for the transportation of its property; that for many years the State of California exempted transportation of property of the United States from the provisions of California law pertaining to the filing of tariffs or approval of rates; that in July, 1955, the Legislature of the State of California amended Section 530 of the Public Utilities Code and deleted therefrom said exemption; that the application of the amended statute would disrupt the established practice of the United States, cause delays in shipments of its property, might jeopardize the security of the United States, and increase the administrative expense of the United States by requiring its officers and officials "to disentangle certain commodities from the mass of commodities in the current of commerce to determine whether or not particular shipments were in fact intrastate" (R. 4); that such shipments would be "thrown into the class rate, which as applied to such shipments, is recognized as unrealistically high" (R. 4, 5); that the commodities involved in such shipments are not in competition with those of commercial shippers; that United States transportation officers might find it more economical to ship interstate and that California carriers might be precluded from participating in such traffic; and that the United States might have to relocate its depot system and might thereby cause loss of employment to citizens of California.

For these reasons the complaint alleged that Section 530 of the Public Utilities Code "and related sections" (unspecified) were unconstitutional and void under Article VI, Section 2 of the Constitution of the United States insofar as said sections prohibit carriers within the State

of California from transporting property of the United States at rates different from those approved by the Commission in that said sections place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; place an unreasonable burden on interstate commerce; contravene the policy of the Congress implicit in the Federal Property and Administrative Services Act of 1949; and that the penalties provided in said Public Utilities Code are vague and uncertain and repugnant to Amendment XIV of the Constitution of the United States.

The complaint further alleged that the enforcement of said Section 530 of the Public Utilities Code would cause immediate and irreparable injury to the United States in that the long established practice of the United States in negotiating special rates would "be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission" (R. 8); the necessity of having rates approved by the Commission "would entail added clerical and administrative work, which would not only be a burdensome interference to the United States in the discharge of its constitutional responsibility, but would likewise add an additonal expense (R. 8); that "with the disruption of the existing rate structure by the application of the section, undoubtedly many particular shipments would be thrown into the class rate structure. Accordingly, the cost of transporting the property for the United States would be immeasurably

made on August 26, 1955, the Commission postponed this cancellation and made it effective December 5, 1955 (Decision No. 51922, Case No. 5432, R. 93-99).

It is very significant that at this time (August 26, 1955) the United States made no move to arrest the effect of the amendment of Section 530 to the extent, as above described, that it was to become self-executing. Nor was any such move made until the filing of the complaint on December 2, 1955, *months after the statute had become self-executing in important areas of traffic,* as above described.

And, with respect to Armed Forces general commodities traffic, viewing the matter prospectively, as of any time before December 5, 1955, it should be noted that *the mere lapse of time and complete inaction by the Commission* would result in the disappearance, on December 5, 1955, of the exemption of that traffic from established rates, due to the Commission's cancellation order.

The record does not show what was done, as first September 7 and then December 5, 1955, approached, by the carriers who had filed or participated in special rate tenders to United States Government agencies. But each one must have done one of two things, (a) cancelled or withdrawn from, or allowed to lapse, his special rate tenders believing in the validity of the compulsion (September 7) of the statute, or the validity of the Commission's cancellation (December 5) of the Item 20 provision; or (b) done nothing to cancel or withdraw. Those who did nothing may have been motivated either by the belief that the statute would automatically, on September 7, 1955, nullify all such tenders for all government traffic except Armed Forces general commodities traffic, and that the Commission's can-

cellation of the Item 20 provision would, on December 5, 1955, have the effect of nullifying special rates for Armed Forces general commodities traffic; or, the failure to act may have been attributable to an intention to oppose and test the constitutionality of the amendment, or of the Commission's cancellation decision.

It must have been clear to the United States when the complaint was filed, at least it ought to have been clear to its responsible officers if they had sought the advice of their counsel who had participated for months in the proceeding before the Commission, that an injunction in December, directed against the Commission and strictly prohibitory in form; in effect commanding inaction by the Commission, would be of no avail whatever to the United States for relieving any of its traffic from previously established rates. Yet, that is the futility which the United States was pursuing when it filed its complaint on December 2, 1955.

It should have been clear also when the complaint was filed that a declaration by the District Court of the unconstitutionality and invalidity of the statute rendered days, or weeks, or months after September 7 and December 5, 1955, would precipitate numerous questions of law and controversies as to what were the lawful rates for the transportation of property of the United States after September 7, 1955. Some of these questions should be described. Would the District Court's declaration of unconstitutionality entered long after September 7, 1955 (in fact dated June 5, 1956, R. 256) relate back to September 7, 1955, the date the statute became effective? If so, what effect would it have on the transportation charges of those

carriers who had cancelled, or withdrawn, or allowed to lapse, their participation in special rates, believing in, and perhaps conditioning their action upon, the validity of the compulsion of the statute? Would the District Court's subsequent declaration breathe life back into those special rate tenders? What about those carriers who did not cancel or withdraw their participation in special rate tenders in the belief (a reasonable one) that these tenders would automatically be nullified by the statute on September 7, or by the Commission's decision on December 5? Would they be bound anyway by their special rate tenders?

The question of rates for Armed Forces general commodities traffic was further complicated by the fact that the California Highway Carriers Act, in referring to minimum rate orders and decisions of the Commission, requires that "upon the issuance by the Commission of any decision or order made applicable to a particular class or group of carriers, or to particular commodities transported or areas served, the Commission shall serve a copy of the decision or order without charge upon each carrier affected . . . Each carrier shall observe any tariff, *decision*, or *order* applicable to it *after service thereof.*" (Public Utilities Code, Sec. 3737.)

The record shows that counsel for the Commission advised the District Court that the Commission would have to give notice to thousands of carriers in the industry (R. 269). The record does not show when the Commission was able to complete the service upon permit carriers of its decision of December 5, 1955, postponing indefinitely the cancellation of the Item 20 deviation provision. But in view of the magnitude of the task it is reasonable to infer

that service upon many carriers was not completed until days after December 5, 1955. What were the rates in the meantime of those who had outstanding special rate tenders? Were those tenders cancelled by the Commission's decision that became effective, for a time, on December 5? And were they revived when the Commission indefinitely postponed this cancellation? Or was the District Court's restraining order *ex proprio vigore*, a rate-fixing order having the effect of nullifying the Commission's cancellation of the deviation privilege in Item 20? These time intervals are important in view of the immense volume of United States Government traffic that moves in California, a volume of such magnitude as to justify the assumption that it moves in a virtually continuous flow.[6]

It is not easy to answer the questions posed above. And in considering them it is very important to bear in mind that *no carrier nor any group of carriers was a party* to the proceeding in the District Court.[7] The question therefore immediately arises as to what extent, if at all, any carrier is bound by the judgment below.

In the light of what has been said about the peculiarities of the rate structure in California, and the deplorable effect produced upon it by the District Court's action, it is clear that the complaint was ill conceived, and that there were serious objections to the granting of declaratory and injunctive relief in this case. The complainant's grievance was so nebulous and contingent that there was uncertainty

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[6]This traffic amounted to 2,121,341 tons intrastate in California in 1954 (R. 2).

[7]A petition by a group of carriers for leave to intervene was denied by the District Court, and their counsel was permitted to argue only as amicus curiae (R. 202).

administrative judgment, and belongs within the primary jurisdiction of the Commission as an administrative agency of the State of California.

(D) The District Court was prohibited by the Johnson Act (28 U.S.C. 1342; App. B, pp. 7, 8) from granting any relief from the Commission's decision of September 6, 1955 (No. 51922). This decision (1) contained an order affecting rates chargeable by public utilities; (2) it was made by a state administrative agency; (3) jurisdiction of the District Court was based upon repugnance of the order to the Federal Constitution; (4) the order by its terms was not applicable to and did not interfere with interstate commerce; (5) the order was made after reasonable notice and hearing; (6) a plain, speedy and efficient remedy could be had in the courts of California. There is good reason in this case why the prohibition of the Johnson Act should be applicable to the United States.

(E) The equities were against the United States. It would not have suffered irreparable *or any injury whatever* in the absence of injunctive relief, and had adequate remedies elsewhere than in the District Court. In addition to the right of the United States, already described, to obtain a final determination of the constitutionality of Section 530 of the Public Utilities Code, as amended, and an interim stay of Commission action thereunder, there was still another way in which the interests of the United States in the intrastate rates of carriers could be fully protected without the exercise of the drastic injunctive remedy. The complaint describes the practice of the United States to move its supplies and materiel by common carrier. In California, as elsewhere, common car-

riers have a legal duty to accept property and transport it without delay. The United States, through its authorized officers, could at any time demand prompt transportation service from these common carriers. If the District Court had not issued its restraining order, the minimum rates established by the Commission would have become controlling on December 5, 1955 upon permit carriers, and the rail and certificated motor carriers would on that date have become bound, under California law, by their own tariffs, by virtue of Section 530 of the Public Utilities Code as amended. But the United States would have been free to set up in actions at law, in the United States Court of Claims, or in the United States District Courts, by way of defense against carriers' claims for payment of minimum or tariff charges, the same argument that it advanced before the District Court below, namely, that the United States is not bound to pay minimum or tariff rates established by a State. Or, in the event that the State of California initiated any proceeding seeking to impose any sanction upon any carrier who charged the United States less than established rates, then the United States could intervene in such a proceeding and there set up the same argument, which would then be available to the carrier as a defense.

This want of equity in the United States is to be contrasted with the *irreparable and continuing* injury to commercial carriers in California resulting from the District Court's injunction and the Commission's compliance therewith. These carriers have now forever lost the right to collect minimum or tariff charges for the transportation of property of the Armed Forces since December 5, 1955,

a right which they would have had but for the restraining order of the District Court and the action taken by the Commission in compliance therewith. The denial of this right, and the consequent accumulation of pecuniary damage, presently continues, and will continue so long as the District Court's injunction remains in effect.

(F) The District Court should have abstained from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California. The District Court was advised at the time the Government applied for a temporary restraining order, on a Friday afternoon, that only affirmative action by the Commission before 12:01 A.M. on the following Monday, countermanding a prior order, could accomplish what the Government sought; that it would be impossible to obtain such action in the limited time available, and give notice of such action to the thousands of carriers who might be affected; that confusion and uncertainty would obtain as to what would be the applicable rates as of 12:01 A.M. the following Monday; that the uncertainty could continue for a substantial period of time; that Government traffic moves in large volume in California, and would probably be moving during this period; that the United States had been a party to a proceeding before the Commission involving the exercise by the Commission of the power conferred by Section 530 of the Public Utilities Code as amended, and that the United States could still fully protect itself by defending against suits by carriers for minimum or tariff rates. The District Court acknowledged that its order might cause confusion; that the Government

might have been dilatory in bringing the matter before the Court; and that the issuance of a restraining order would cause a "mechanical problem" to the Commission and cause financial loss to carriers.

The written restraining order proposed by the United States, being merely prohibitory in form, was inconsistent with the restraining order orally proposed requiring affirmative action by the Commission, and was calculated to put the burden on the Commission of trying to resolve this ambiguity, and of choosing between being in contempt of the District Court for failure to take affirmative action, and doing nothing as required by the written restraining order, whereas the burden was on the United States to propose an unambiguous restraining order making plain what was required of the Commission.

Despite these inequities, the District Court issued the proposed restraining order and orally construed it to require affirmative action by the Commission. Thereupon the Commission convened and decided to take affirmative action. It issued a new order countermanding its prior order. But the Commission did none of these things until after 12:01 A.M., Monday, December 5, 1955. A cloud of uncertainty was thus cast upon the rate structure for Government traffic in California, a cloud that has not been and will not be dispelled for many months. There was little comity and no wise accommodation exemplified by this rough handling of California's sovereignty.

II. A. The District Court erred in overruling the Commission's objections to questions calling for expressions of opinion by the Government witnesses upon the ultimate issues in the case. Analysis of the record shows

that this was not merely a harmless error of discretion, but that it resulted in the District Court's being unduly swayed by the *in terrorem* testimony of high ranking military officers zealous in the performance of their duties as members of the Armed Forces, the rights of the several states to the contrary notwithstanding.

B. The United States did not prove at the trial that it would suffer irreparable injury in the absence of injunctive relief. Not only did the United States have adequate legal remedies to protect its interests, but analysis of the record shows that its only possible injury from California's regulation of intrastate rates for the transportation of property of the United States is that of increased costs for such transportation. This was not enough to require the striking down of the state statute, according to *Penn Dairies v. Milk Control Commission,* 318 U.S. 261, 87 L. ed. 748.

III. The District Court's final judgment was erroneous. Whether this judgment rested upon the broad ground that any attempt whatever by any State to regulate the intrastate rates of carriers of property of the United States is unconstitutional, or whether the judgment rested upon the narrow ground merely that Section 530 of the Public Utilities Code, as amended, of the State of California, in particular is unconstitutional, in either event the judgment was wrong. There is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit State regulation of such rates. Nor is any immunity of the national government from any burden resulting from such regulation to be implied from the Constitution. Nor does State regulation of such rates conflict with any Congres-

sional legislation, or with any discernible Congressional policy or intent. The Armed Services Procurement Act of 1947, the Federal Property and Administrative Services Act of 1949, and the regulations promulgated thereunder, are wholly consistent with State regulation of intrastate rates for the transportation of property of the United States. The California Legislature's amendment of Section 530 of the Public Utilities Code was a lawful exercise of a power reserved to the States by the Tenth Amendment of the Constitution of the United States. The judgment of the District Court declaring this statute unconstitutional and void, and restraining any Commission action under it, was a violation of said Tenth Amendment.

ARGUMENT.

I.

THE DISTRICT COURT SHOULD NOT HAVE ENTERTAINED THE COMPLAINT BUT SHOULD HAVE GRANTED THE COMMISSION'S MOTION TO DISMISS THE ACTION.

A. The complaint did not allege or describe an "actual controversy" within the meaning of the Declaratory Judgment Act (28 U.S.C., Sec. 2201), and within the grant of judicial power in Article III, Section 2, clause 1, of the Constitution of the United States.

The complaint covers 9 pages of the printed record (pp. 1-9).

The Commission is named as the sole defendant but there is not a single word in the complaint alleging that the Commission had done, or was about to do, or had threatened to do anything whatever adverse to the United States or to its officers or agents. Nor is there any allega-

tion of any circumstance giving rise to a duty in the Commission to do any such act, and to the probability thereof. The only act described in the entire complaint that is possibly adverse to the United States is that "in July, 1955, the Legislature amended Section 530 of the Public Utilities Code and deleted" certain parts thereof. The United States then alleged that "the application of Section 530 of the Public Utilities Code, as amended, to shipments made by it *would*" have certain prejudicial consequences. But there is no allegation that the Commission had applied, or was about to apply, or had threatened to apply said Section 530 to shipments made by the United States, or that it would administer said statute in an unlawful or burdensome way; nor is there any allegation of any circumstance giving rise to a duty in the Commission so to apply said section as amended, and to a probability that the Commission would so apply it; nor is there any such allegation with respect to any California law enforcement officer or agency. Nor did the Government at the trial offer any evidence of any of these things.

The Commission is entitled to ask who is the adversary against whom the United States is proceeding. Is it the State of California; or the Commission? The Commission is not the State of California but an agency thereof created by its people in its Constitution (Article XII, Section 22; App. C, p. 30). If the State of California was intended as the adversary, why did not the complaint say so, and why was not the State of California proceeded against, as in *United States v. California* (1946) 332 U.S. 19; 91 L. ed. 1889? If the Commission was intended as the adversary, why was there no allegation of any act or

threatened act by the Commission adverse to the United States? See *Watson v. Buck* (1941) 313 U.S. 387; 85 L. ed. 1416; *Ex Parte La Prade* (1933) 289 U.S. 444; 77 L. ed. 1311; *United Public Workers v. Mitchell* (1947) 330 U.S. 75; 91 L. ed. 754.

These questions do not raise mere legal niceties, but disclose some deepseated fallacies in the theory of declaratory relief for the purposes of this case, fallacies that are very glaring when seen in the light of the principles governing declaratory relief discussed in *Public Service Commission of Utah v. Wycoff* (1952), 344 U.S. 237, 243, 244, 247; 97 L. ed. 291, 296-298; *Alabama State Federation of Labor v. McAdory* (1944), 325 U.S. 450; 89 L. ed. 1725; and more recently applied in the case of *Public Utilities Commission of California v. United Air Lines* (1953), 346 U.S. 402; 98 L. ed. 140. In a discussion of declaratory relief in the *Wycoff* case, it was said: "While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." It was pointed out that in that

case "The proposed decree cannot end the controversy." It was also said that the declaratory proceeding was not appropriate in that case "because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship;" and that "declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system."

In order to demonstrate why declaratory relief was inappropriate for purposes of the present case, and to show the deplorable consequences that followed the granting of such relief, it is necessary to describe the peculiarities of the rate structure in California as it existed prior to September 7, 1955 (the effective date of the amendment to Section 530), and how it was affected by the amendment and by the subsequent action of the District Court.

It is well settled that tariffs, when established, have the force and effect of statutes. *Cramer v. Lowden* (1942), 315 U.S. 631, 635, 636; 86 L. ed. 1077, 1080; reh. den. 316 U.S. 708; 86 L. ed. 1775.

Prior to the California Legislature's amendment of Section 530 of the Public Utilities Code in 1955, rail and certificated motor carriers, in assessing charges for the transportation of property of the United States, irrespective of the kind of property, and irrespective of the agency making the shipment, were free to depart from their previously established tariffs that were applicable to commercial shippers. And permit carriers, in assessing charges for the transportation of *general commodities for the Armed Forces* of the United States, were free to charge

less than the minimum rates established by the Commission and applicable to other shippers. It was the intention of the 1955 amendment to withdraw this unlimited and unconditional privilege from the rail and certificated motor carriers, but with a proviso that would continue their right to meet the competition of the permit carriers. So long as the third paragraph of Item 20 in Minimum Rate Tariff No. 2 remained in effect, uncancelled by the Commission, the permit carriers would have an unlimited right to charge less than minimum rates for the transportation of *general commodities for the Armed Forces* even after the amendment to Section 530 became effective. And, by virtue of the proviso referred to, this right would also be available to rail and certificated motor carriers.

It can thus be seen that paragraph 3 of Item 20 of Minimum Rate Tariff No. 2 was the keystone in the arch of exemption of *Armed Forces general commodities traffic* from established rates.

With respect, however, to certain special commodities, such as petroleum (Minimum Rate Tariff No. 6), and fresh fruits and vegetables (Minimum Rate Tariff No. 8), and livestock (Minimum Rate Tariff No. 3), there had never been in the applicable minimum rate tariffs established by the Commission for those commodities any authority to permit carriers to charge less than the minimum rates named therein, neither to the Armed Forces nor to any of the civilian agencies of the United States government, such as the General Services Administration, the Veterans Administration, the Bureau of Reclamation, and others. With respect to these special commodities and the civilian Government agencies, the rail and certificated

motor carriers were relieved of the duty of charging the rates named in their own tariffs only by virtue of the exemption for all government traffic contained in Section 530 of the Public Utilities Code before its amendment.

In its effect upon rail and certificated motor carriers therefore, the amendment to Section 530, removing this unconditional exemption and making it depend upon Commission authority, was *self-executing in important areas of government traffic;* that is to say, no further action whatever, by anyone, was necessary to subject to rates *previously established* for commercial shippers the traffic of all United States government agencies in certain special commodities, and traffic of the civilian agencies in all commodities.

On September 7, 1955, therefore, traffic of the United States Government became subject, like traffic of commercial shippers (except to the extent that the proviso in the amendment to Section 530 became operative) to the legal duty imposed upon rail and certificated motor carriers by Section 494 of the Public Utilities Code (Appendix C, p. 31) to charge their tariff rates. On that date, all special rate quotations of rail and certificated motor carriers formerly available to the United States were (with the exception noted) automatically superseded, through the operation *ex proprio vigore* of the amendment, by the previously established tariff rates of rail and certificated motor carriers.

Nor has the applicability of these rates of rail and certificated motor carriers to the United States Government been changed by anything that has happened since September 7, 1955, unless it should be decided (and it

would be a very dubious result[3]) that the temporary restraining order of the District Court on December 2, 1955, or its final judgment on June 5, 1956, was *ex proprio vigore* a rate-fixing order, having the effect of reinstating all the special rate quotations previously available to the United States. Even then, it will be seen that there was a substantial interval of time intervening between September 7 and the dates of the restraining order and the final judgment.

Although the amendment to Section 530 was self-executing, as described, upon substantial portions of United States government traffic, there was another large and important area of such traffic that was not automatically affected by this amendment on September 7, 1955, because it was reached by the proviso in the amendment, namely, Armed Forces general commodities traffic.

In anticipation of the results that would occur on September 7, 1955, and in realization of the fact that the Legislature's intention to correct the evils and abuses surrounding the transportation of Government property would be frustrated in a large and important area of such traffic so long as the deviation privilege in Item 20 for Armed Forces general commodities remained outstanding, the Commission on August 16, 1955, cancelled Item 20, effective September 7, 1955, contemporaneously with the effectiveness of the amendment of Section 530 of the Public Utilities Code (Decision No. 51832, Case No. 5432, R. 90-92). Then, at the request of counsel for the United States,

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[3]See *United States v. Kansas City Southern Railway Co.* (1955; C.A. 8) 217 Fed. 2d 763, 768 holding that courts cannot make rates.

as to who was its adversary, and as to what kind of injunctive relief was needed to protect the complainant's asserted interests. The result was that one party was named as the sole defendant (the Commission), while only the act of another (the California Legislature) was alleged; a restraining order was proposed in writing that was entirely prohibitory in form, while it was orally proposed that the Commission be commanded to take affirmative action; because of the self-executing character of the amendment to Section 530, neither kind of injunctive relief could accomplish what the Government and the District Court sought to accomplish, namely, maintenance of the *status quo* (R. 273, 277); and any attempt by the Commission to comply with the District Court's ambiguous restraining order was calculated to cause confusion and uncertainty, and to result in litigation as to what were the lawful rates of carriers on and after December 5, 1955.

These circumstances furnish an excellent example of the deplorable consequences that can follow upon hasty, ill-considered, and reckless interference by a federal court in a State's local affairs, where there may exist complexities not immediately perceived or understood.

It should not be concluded from the forgoing that the Commission denies the right of the United States ever to litigate the question of the right of a State to regulate the intrastate rates of carriers of property of the United State. But this question can arise in a variety of ways, each providing a context different from the others and giving a different complexion to the constitutional question. There is an almost limitless variety in the kinds of property transported for the United States by commercial car-

riers (R. 371, 881). Much of it, but by no means all, is Armed Forces traffic (R. 881). The Armed Forces ship many items peculiar to military organizations, such as ammunition and tanks (R. 371), but they also ship a very large volume of commodities of the same kind as those of commercial shippers; subsistence items, for example.[8] Some of the articles shipped by the Armed Forces involve military or national security (R. 599, 601); others do not. With respect to some articles, speed in movement is of the essence (R. 499, 500), while with others time is not important. Many articles presently move under the class rates applicable to commercial shippers (R. 377, 572), special rates not having been sought by the Government nor offered by carriers. Traffic in such articles would be little, if any, affected by state regulation. Some shipments may move from one enclave under exclusive federal jurisdiction to another such enclave; for others, origin or destination, but not both, may be in such an enclave.

The constitutional question could be precipitated in various ways, viz., (a) an action by a carrier in the United States Court of Claims or District Court to recover charges based upon established rates (see *Hughes Transportation, Inc. v. United States* (1954), 121 Fed. Supp. 212[9]); (b) a proceeding by the state against a carrier to invoke sanctions for assessing less than established rates

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[8]In California there is more traffic in subsistence items than anything else (R. 388, 522).

[9]One wonders why the Government elected not to permit this case to be the vehicle for a test of the constitutionality of a state law regulating rates for the transportation of property of the United States. It arose out of transportation performed for the Government prior to May, 1952. The Court of Claims rendered

for the transportation of property of the United States, in which the United States could intervene; (c) a proceeding before the Commission wherein a carrier, or the United States, felt itself aggrieved by a decision of the Commission exercising its statutory authority.

All of these proceedings could terminate in this Court, where the constitutional question could be decided (*Alabama Public Service Comm. v. Southern R. Co.* (1951), 341 U.S. 341; 95 L. ed. 1002), and all of these proceedings would involve *specific transportation*, that is, specific points of origin and destination, specific commodities, and specific agencies of the Federal Government. It could be ascertained in any such proceeding whether time was of the essence; whether the transportation was for the military or civilian agencies of the United States; whether military or national security or federal enclaves were involved; whether the established rates were reasonable or unreasonable when applied to specific transportation of property of the United States; and whether state regulation of that specific transportation was unduly burdensome upon the United States.

Multiplicity of actions is no objection. On the contrary, it is most desirable that the principles to be applied to a constitutional question of this magnitude be evolved in a number of proceedings presenting various aspects of that question.

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its decision upholding state regulation on May 4, 1954. On December 6, 1954, the United States filed a motion requesting reconsideration (R. 69). On July 12, 1955, the Court of Claims reopened the case and referred it to a commissioner to take evidence (R. 70). This case has apparently been shelved ever since.

Conflicts of interest arising in such proceedings would, in the language of the *Wycoff* case, be "ripe for determination as controversies over legal rights." The disagreements would "not be nebulous or contingent but [would] have taken on fixed and final shape so that a court [could] see what legal issues it is deciding, what effect its decision [would] have on the adversaries, and some useful purpose [would] be achieved in deciding them." Final decisions in such proceedings would end the controversies. Moreover, the ultimate determination by this Court of the issues raised in such proceedings would not be "incompatible with a proper federal-state relationship" and would not involve an "anticipatory judgment by a federal court to frustrate action by a state agency."

The judgment of the District Court in the present case violated nearly all the rules of the *Wycoff* case. It was a radical and sweeping intervention in a field of public law that had the effect of foreclosing in the future any State regulation whatever in an area where the Federal versus State problem could arise in a number of different contexts, each one of which would give a somewhat different complexion to that problem. This intervention was premature in the sense that it was undertaken before any specific transaction or any specific Federal agency or carrier was affected by State regulation, and at a time when the conflict of interest between State and Federal Government was nebulous and contingent. From another point of view the intervention came too late and was futile for the purpose of resolving a number of questions that will arise out of the fact that the statute become partially effective, and the Commission's cancellation of the deviation privilege

became temporarily effective, or at least apparently so. So far from ending controversy, the District Court's order had the effect of stirring up litigation. The declaratory ruling sought by the complaint (and granted by the District Court) reached far beyond any particular case and beyond what was warranted by the circumstances, since it *affected all Government traffic under all conditions.* (R. 256, 257). The action taken by the District Court did extreme violence to a proper Federal-State relationship, without any regard for the implications of our Federal System.

Moreover, the judgment below ignored the principles applicable to declaratory relief laid down in the above cited case of *Alabama State Federation of Labor v. McAdory* (1945), 325 U.S. 450, 461, 471; 89 L. ed. 1725, 1734, 1740. In this case it was said:

> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . This Court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied, . . .
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> "The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court. . . . It would be an abuse of discretion for this Court

to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the state by forestalling state action in construing and applying its own statutes. . . ."

B. The United States failed to exhaust the administrative remedy available to it in a proceeding before the Commission.

The United States had available to it an administrative remedy which it should have pursued instead of seeking relief from this Court. Its interests could have been fully safeguarded and preserved by taking advantage of the machinery afforded by California law to stay the order in the Commission's decision of September 6, 1955, which cancelled, effective December 5, 1955, the deviation privilege contained in Item 20 of Minimum Rate Tariff No. 2, pending a test of its constitutionality. This decision (Decision No. 51922; R. 93-99) was rendered in a proceeding in which the United States appeared as a party. Under California law the United States thereupon had a right to file with the Commission an application for rehearing (P.U. Code Sec. 3739; App. C, p. 37) which, had it been filed ten days or more before the effective date of the

Commission's decision, would have suspended the order until the application for rehearing was granted or denied (P.U. Code, Sec. 1733; App. C, p. 31). If the Commission had denied the application for rehearing, the plaintiff could have applied to the Supreme Court of California "for a writ of certiorari or review for the purpose of having the reasonableness" of the Commission's decision "inquired into and determined" (P.U. Code, Secs. 3740, 1756; App. C, pp. 37, 32). In such a proceeding before the California Supreme Court, California law provides that the review shall include a determination of whether the Commission's order or decision violates any right of the petitioner under the Constitution of the United States (P.U. Code, Sec. 1757; App. C, p. 32); and that where the validity of the Commission's order or decision "is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the determination of the constitutional question shall not be final." (P.U. Code, Sec. 1760.)

California law also provides the means of obtaining from the California Supreme Court a stay of a Commission order during the pendency of such a writ, including a temporary stay without notice or hearing, where irreparable injury would result in the absence of such relief (P.U. Code, Secs. 1761-1764; App. C, pp. 32-35).

Under California law proceedings in the Supreme Court of California involving any order or decision of the Commission ". . . shall be preferred over, and shall be heard and determined in preference to, all other civil business

except election causes, irrespective of position on the calendar. . . ." (P.U. Code. Sec. 1767).

If the United States were aggrieved by any decision of the California Supreme Court, it then would have a direct right of appeal to this Court (28 United States Code, Sec. 1257(2); App. B, p. 7), pending which a motion to stay the judgment of the California Supreme Court could be addressed to this Court (Rule 18 of Revised Rules of the Supreme Court of the United States; App. B, p. 18).

In this way amended Section 530 of the Public Utilities Code and the Commission's action in connection therewith could have been tested as to their constitutionality by this Court without ever having become effective, and the United States would have suffered no injury whatever, irreparable or otherwise.

The California Supreme Court would thus have had an opportunity to authoritatively interpret the amended statute, and to define the scope of the Commission's power thereunder. It is important, for reasons that will more fully appear hereinafter, to afford the California Court such an opportunity since the constitutionality of the statute may well turn upon the interpretation given to it by the highest court of the state. *Alabama State Federation of Labor v. McAdory* (1945), 325 U.S. 450; 89 L. ed. 1725. It is very important to know, for example, whether the Commission, in exercising its power under the amended statute, could authorize rates for the transportation of property of the United States to become effective retroactively; whether it could authorize a blanket exemption from established rates for certain kinds of Government traffic; whether there is discernible in the amended statute

a legislative policy to extend preferential rate treatment to the United States and other governmental bodies; whether a public hearing is necessary upon applications to the Commission for authority to deviate from established rates for the transportation of property for the United States; and whether any sanctions provided by California law for any violation of Section 530 would impinge upon the United States, or its officers or agents. It is important to know the answers to these questions before any conclusion is reached as to whether the statute would be unduly burdensome to the United States, or whether its interests will be little if any affected by the state regulation. *Leiter Minerals, Inc. v. United States* (1957), 352 U.S. .....; 1 L. ed. (2d) 267. In the case cited it was said (L. ed. p. 275): ". . . as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. . . ." And disposition of the federal court action in that case was ordered delayed to permit the parties to seek an interpretation of the state statute in the state court.

The Government elected however not to pursue the above described method of seeking judicial review of the Commission's power, presumably because the Commission's Decision No. 51922 granted the relief requested by the Government in its petition of August 26, 1955, namely, a postponement of the effective date of the Commission's order of August 16, 1955, cancelling the tariff provision. This petition (R. 104-109) is highly significant for a number of reasons. First, it acknowledges (para. 10) the Commis-

sion's jurisdiction over the rates in question and, in effect, acquiesces in that jurisdiction; second, it discloses the Government's confidence that it could accommodate itself to the new conditions and make necessary adjustments "within a relatively short time" (para. 9); third, it implies a voluntary election not to challenge the constitutionality of the 1955 amendment of Section 530 of the Public Utilities Code, and of the Commission's action in connection therewith, and to take the benefit thereof.

It is plain, therefore, that the United States has failed to exhaust an administrative remedy available to it, and this Court has declared that under such circumstances there is no right to relief in the Courts. *Alabama Public Service Comm. v. Southern R. Co.* (1951), 341 U.S. 341; 95 L. ed. 1002; *Myers v. Bethlehem Shipbuilding Corp.* (1938), 303 U.S. 41; 82 L. ed. 638; *Coffman v. Breeze Corps.* (1945) 323 U.S. 316; 89 L. ed. 264; *Aircraft & D. Equipment Corp. v. Hirsch* (1947), 331 U.S. 752; 91 L. ed. 1796; *Allen v. Grand Central Aircraft Co.* (1954) 347 U.S. 535, 540, 553; 98 L. ed. 933, 946.

In the last two cited cases it was held that the presence of constitutional issues does not avoid the necessity of exhausting administrative remedies.

There is another course of action which was, and still is, available to the Government whereby it could have obtained, and still can obtain, from the Commission, relief from the tariff rates established by California law for commercial shippers. It could negotiate reduced rates with the carriers who would be free to apply to the Commission for authority to assess them pursuant to the provisions of

Section 530, as amended, and Public Utilities Code Section 2666 (App. C, p. 36). This is the course which the Government first elected to pursue when it requested of the Commission a 90-day postponement of the effective date of the Commission's action to permit the negotiation of "mutually acceptable tenders" (R. 107). In denying the Government's request for a second postponement of sixty days, the Commission said that its action would "in no way preclude carriers from filing applications for such rate exceptions as they may consider to be just and reasonable." (R. 101).

Apparently a lack of diligence on the part of the Government in negotiating new rate agreements with the carriers prevented the consummation of such agreements within the 90 days allowed by the postponement of the effectiveness of the Commission's action, but the opportunity to effect such agreements and obtain Commission approval is still open.

C. The complaint raised an issue which is within the primary jurisdiction of the Commission as an administrative agency of the State of California.

The complaint alleged (R. 4, 5) that "the application of Section 530 of the Public Utilities Code, as amended, to shipments made by [the United States]," among other things, would cause such shipments to be "thrown into the class rate, which, as applied to such shipments, is recognized as unrealistically high, because the density, volume and other characteristics of such shipments would normally entitle them to rates equivalent to the commodity rates negotiated by commercial concerns."

Some evidence, which will be more fully described hereinafter, purporting to prove this allegation, was adduced by the Government at the trial.

A determination of whether or not "class rates" when applied to shipments of the United States are "unrealistically high" because of the alleged peculiar characteristics of such shipments, requires the exercise of an informed administrative judgment.

There is a number of cases in which this Court has described and applied the "primary jurisdiction doctrine." This doctrine is closely related to, but is distinct from, the doctrine that an available administrative remedy must be exhausted before relief can be obtained in the Courts, and requires that administrative questions be determined by administrative agencies rather than by the Courts.

The doctrine was established in the *Abilene Cotton Oil* case (*Texas and Pac. R. Co. v. Abilene Cotton Oil Co.* [1907], 204 U. S. 426; 51 L. ed. 553) and has been applied in a number of subsequent cases of which *Far East Conference v. U.S.* (1951), 342 U.S. 570; 96 L. ed. 576, and *U. S. v. Western Pac. R. Co.* (1956), 352 U. S. .....; 1 L. ed. 2d 126, are examples. It was said in the case of *Public Service Commission of Utah v. Wycoff* (1952), 344 U.S. 237, 246; 97 L. ed. 291, 297 that "Even when there is no incipient Federal-State conflict, the declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review."

A careful reading of the District Court's opinion, findings of fact, conclusions of law, and judgment, leaves one in doubt as to whether the District Court decided the question of whether "class rates" are "unrealistically high" when applied to Government shipments. There is reason to believe that it did decide this question. Thus, in finding No. XIII (R. 247) in referring to large volume shipments of the United States, the District Court found that if Section 530, as amended, became effective, "such shipments would have to be made at the class rate. In many instances the class rates would be 50% to 100% higher than the commercial[10] rate for shipments of similar character." And in finding No. XV (R. 248), the District Court found that many military items that move under so-called "freight all kinds" rates "would be thrown into a very high classification. In many situations, the freight rate for such shipments would be increased by 150%."

Presumably, these findings entered into the District Court's conclusion of law No. V (R. 254) that Section 530, as amended, "will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense."

In any event, whether the District Court did or did not determine the issue of whether "the class rate" is "unrealistically high," its action had the effect of depriving the Commission of any opportunity to exercise its informed administrative judgment upon this question.

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[10]It is believed that the Court intended to use the word "commodity" instead of the word "commercial".

D. The District Court was prohibited by the Johnson Act, 28 U.S.C. 1342, from granting the injunctive relief requested by the complaint.

The Johnson Act, 28 U.S.C. 1342, is as follows:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "(2) The order does not interfere with interstate commerce; and,
>
> "(3) The order has been made after reasonable notice and hearing; and,
>
> "(4) A plain, speedy and efficient remedy may be had in the courts of such State."

All of these conditions were fulfilled in the present case with respect to the Commission's orders upon the subject of rates for the transportation of property for the United States Government.

(1) In substance the complaint alleged that certain action of the State of California was repugnant to the Constitution of the United States (paras. I, VI; R. 1, 6), and no reference was made therein to any order of the Commission. As stated above, however, in the Chronological Narration of Facts (supra, pp. 15, 17, 18) such orders were in fact issued and the District Court interpreted its temporary restraining order as requiring the Commission to abate its order issued September 6, 1955 (Decision No.

51922; R. 93-99) which cancelled (effective December 5, 1955) the tariff provision giving permit carriers unlimited authority to deviate, for transportation of Armed Forces general commodities traffic, from the minimum rates established by the Commission.

It has already been explained (supra, pp. 14, 15) how, by virtue of the proviso in the 1955 amendment to Section 530 of the Public Utilities Code, the rates of rail and certificated motor carriers for the transportation of Armed Forces general commodities traffic were allowed to drop to the rates of permit carriers. The Commission's order in said Decision No. 51922, therefore, had the effect of withdrawing from both permit and rail and certificated motor carriers their former privilege of charging less than established rates for the transportation of such traffic.

It has been explained, also, (supra, p. 7) that rail and certificated motor carriers are public utilities for all the purposes of California law (Public Utilities Code Secs. 211 (d); 213; 216(a); App. C, pp. 30, 31); and there is, therefore, no doubt that the Commission's order in said Decision No. 51922 was an "order affecting rates chargeable by a public utility and made by a state administrative agency" within the meaning of the Johnson Act.

The Commission submits also that permit carriers, although regulated in California under the Highway Carriers' Act and distinguished from rail and certificated motor carriers for certain purposes of regulation, nevertheless should be considered as public utilities within the meaning of the phrase "public utility" as used in the Johnson Act. As appears at the outset of the Highway

Carriers' Act, permit carriers are engaged in "a business affected with a public interest," and are regulated in California for the purpose of serving public needs and objectives (P.U. Code, Sec. 3502; App. C, p. 35).

The order contained in Commission Decision No. 51922, as it affected permit carriers, was therefore an "order affecting rates chargeable by a public utility and made by a state administrative agency." *Morel v. Railroad Commission* (1938), 11 C. (2d) 488; *Entremont v. Whitsell* (1939), 13 C. (2d) 290.

(2) The order contained in Commission Decision No. 51922 did not interfere with interstate commerce. As already explained, this order had the effect of requiring both permit and rail and certificated motor carriers to assess, for the transportation of Armed Forces general commodities traffic, the same rates as they assess against commercial shippers, unless otherwise authorized by the Commission. Such rates, for permit carriers, were those established in Minimum Rate Tariff No. 2. By its own terms this tariff is applicable only to "transportation of shipments between *all points within the State of California*" with certain exceptions not material here (Minimum Rate Tariff No. 2, Item 30; App. C, p. 39).

This provision in Minimum Rate Tariff No. 2 reflects the provision contained in the Highway Carriers' Act that "This chapter [containing the regulations for permit carriers] shall not be construed as a regulation of commerce with foreign nations or among the several States, except insofar as such regulation is permitted under the provisions of the Constitution and the acts of the Congress of the United States." (P.U. Code, Sec. 3506).

That part of California law governing rail and certificated motor carriers and the Commission's regulation thereof, namely, the Public Utilities Act, provides that "Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States, . . ." (P.U. Code, Sec. 202).

It thus appears that the State of California has expressly recognized the constitutional limitations upon its power, and has made it plain that the Commission's delegated powers do not operate upon interstate commerce unless authorized by the Constitution and laws of the United States. There can be no doubt therefore that the Commission's Decision No. 51922 affected rates only for transportation of Armed Forces general commodities traffic *between points within the State of California.* Wherever it could be shown that such property was moving in interstate commerce, such fact, *ipso facto,* would give rise to an exemption from any rates established by California law, unless the contrary result is permitted under the Constitution and laws of the United States.

(3) The description heretofore given (supra, pp. 10-17) of the history of the proceedings before the Commission leading up to Decision No. 51922 shows clearly that the order issued in said decision was "made after reasonable notice and hearing." A Notice of Hearing was sent to all interested parties on August 10, 1955, giving fifteen days notice of a rehearing on August 25, 1955, upon the petition of the California Government Traffic Conference (R. 114), and it is stated in the subsequent decision thereon that

"public hearings were held . . . at San Francisco on August 25, 1955." (Decision No. 51922; (R. 94).)

(4) A description was given above under topic I B (supra, pp. 55-57) of the remedy available to the United States before the Commission, and thereafter in the Supreme Court of the State of California, whence a direct appeal lies to this Court. It is clear from this description that this remedy is "plain, speedy and efficient."

For the foregoing reasons, the Commission submits that the Johnson Act prohibited the District Court from granting the injunctive relief requested by the complaint.

The Commission further submits that the Johnson Act's clearcut policy and prohibition are not to be circumvented merely by requesting a declaratory judgment as additional relief. *Great Lakes Dredge & Dock Co. v. Huffman* (1943), 319 U. S. 293, 299; 87 L. ed. 1407, 1412.

"The Johnson Act was designed to prevent federal assumption of jurisdiction to adjudicate and not merely the issuance of an injunction." Borchard, Declaratory Judgments, p. 828 (2d ed. 1941).

The Commission is aware of the holding in *Leiter Minerals Inc. v. United States* (1957) 352 U.S. .....; 1 L. ed. 2d 267, that the prohibition against federal court action contained in 28 U.S.C. Sec. 2283[11] is not applicable when the United States seeks a stay of proceedings in a State court. The Commission is also cognizant of the holding in

[11]28 U.S.C. Sec. 2283 is as follows: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

U. S. v. United Mine Workers (1947), 330 U.S. 258; 91 L. ed. 884, that the provisions of the Norris-La Guardia Act (47 Stat. 70, 29 U.S.C. Sec. 101), prohibiting federal court jurisdiction, subject to qualifications, to issue an injunction in labor disputes to enjoin certain acts, did not apply to the United States.

The Commission, however, respectfully urges that there are considerations present in the instant case, and potentially in others like it, that require a different conclusion from those announced in the cases just cited. The Johnson Act is concerned with maintaining the integrity of State regulation of public utility rates. The various agencies of the United States Government, military and civil, have become in recent years consumers of public utility services on a very large scale, and *on a continuing basis*. Through their representatives, they frequently appear as parties in proceedings before State agencies that exercise regulatory authority over public utility rates. It is to be expected that their attorneys will be zealous, as they should be, in asserting and protecting to the utmost the interests of the United States as a utility rate payer. It would be unfortunate, however, if these agencies were encouraged to believe that they could resort to a federal court whenever they were disappointed in the action of a State regulatory agency in fixing public utility rates. The rate fixing authority of the States would be just as effectively paralyzed by such action as it formerly was by the public utilities before the enactment of the Johnson Act.[12] See *Kansas-Ne-*

[12]This analysis immediately suggests a deeper problem which will be discussed below in a subsequent topic (infra pp. 151, 162), namely, if it should be held that the United States is not bound

braska Natural Gas Company, Inc. v. City of St. Edward (1955; U.S.D.C. Neb.) 134 F. Supp. 809, 828; (C.A. 8) 234 F. 2d 436.

The large scale and continuing use of public utility services by United States Government Agencies will insure to the United States a lively and continuing interest in rate proceedings before State regulatory bodies, and in the rates fixed therein. If it should be established as a precedent that the Johnson Act does not bar the way of the United States to the Federal Court, it is easy to imagine a succession of cases in that forum seeking nullification of State rate orders.

The *Leiter Minerals Case*, on the other hand, involved an unusual if not unique set of circumstances wherein the interest of the United States was as a proprietor of certain land which it had purchased for $25,000 and which was the subject of a series of transactions involving mineral rights therein. The precedent of that case is not likely to prove embarrassing to the States. The same can be said of the *United Mine Workers Case* which arose out of the extraordinary emergency caused by the 1946 strike in the bituminous coal industry while the Government was in possession of the mines pursuant to an Executive Order of the President. There was no Federal-State conflict, and the need for brushing aside the impediment of the Norris-La Guardia Act under such circumstances is not likely to arise very often.

The District Court, in its opinion, did not meet the objection to its jurisdiction presented by the Johnson Act.

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by State regulation of transportation rates, why should it be bound by State regulation of rates of other kinds of public utility services?

(R. 233). Instead, without a clear-cut and specific recognition even of the existence of the Commission's order, the District Court says its jurisdiction was based "principally upon the unconstitutionality of a *statute*, not of an *order* . . . made by a State administrative agency or a rate-making body." (Emphasis by District Court). Apparently the District Court forgot the urgent appeal made by counsel for the Government when he applied for a temporary restraining order (R. 265), and failed to understand that it was essential to the Government's purposes to nullify the Commission's order.

E. The equities were against the United States; it would not have suffered irreparable or any injury in the absence of injunctive relief by the District Court, but had adequate remedies elsewhere; on the contrary, persons other than the United States have suffered, and will continue to suffer irreparable injury as a result of the District Court's granting the request for injunctive relief.

At this point, the Commission's purpose is merely to show why the District Court should not have entertained the action and why it should have granted the Commission's motion to dismiss. For this purpose, it seems proper to consider merely the allegations of the complaint and the affidavits in support thereof and to demonstrate their inadequacy as a foundation for the issuance of a temporary restraining order. In a subsequent topic, it will be shown that nothing was added by the Government at the trial to justify permanent injunctive relief.

After referring, in paragraph VI (R. 6) to "Section 530 and related sections [unspecified] of the Public Utilities Code of the State of California," the complaint alleged in paragraph VII (R. 7, 8) that "the said section

and related provisions [unspecified] and regulations [unspecified]" would "cause immediate and irreparable injury to the United States," for the following reasons, in substance:

(1) Disruption of long-established rate structure would cause "confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission."

(2) Added clerical and administrative work and additional expense.

(3) Shipments would be thrown into "class rate structure," resulting in increased transportation cost, for which the United States could not be compensated by bond or otherwise.

(4) The United States "*might* be compelled to reveal information in connection with particular shipments which for purposes of national security should be kept secret."[13]

Without stopping to argue at length that these allegations are not well pleaded (an objection that was made by the Commission in its Memorandum of Points and Authorities in support of its Motion to Dismiss, R. 71), the Commission submits that the only thing approximating a clear, forthright allegation of damage is the allegation that the enforcement of California law would result in increased cost and expense to the United States. Assuming the truth of this allegation for purposes of considering the preliminary question as it was presented to the District Court, and assuming, for the same purpose, that the

[13]Nothing of substance was added by the affidavits (R. 189-198).

United States would prevail on the ultimate question of whether California may regulate rates for transporting property of the United States Government, these assumptions, nevertheless, did not demand injunctive relief. It has already been described above in topic I B (supra, pp. 55-57) how the United States could have tested in this Court the constitutionality of Section 530 of the Public Utilities Code, as amended, and obtained an interim stay of Commission action thereunder, without such Commission action ever becoming operative upon the United States, with the result that the United States would have suffered no injury whatever, irreparable or otherwise.

But there was still another way in which the interests of the United States in the intrastate rates of carriers could be fully protected without the exercise of the drastic injunctive remedy and its lamentable consequences. The complaint describes the practice of the United States to move its supplies and material by common carrier. (R. 2, 3). In California, as elsewhere, common carriers have a legal duty to accept property and transport it without delay (California Civil Code, Sections 2114, 2169; Appendix C, p. 39; *Standard Oil Co. v. Johnson* [1944] 24 C. 2d 40, 46). The United States, through its authorized officers, could at any time demand prompt transportation service from these common carriers. Nor would this duty of such carriers have been affected by the existence of any controversy with the United States as to what were the lawful rates. *New York Central R. Co. v. Public Utilities Commission of Ohio*, 119 Oh. St. 381; 164 N.E. 427; *Corbett v. Atlantic Coast Line R. Co.*, 205 N.C. 85; 170 S.E. 129.

If the District Court had not issued its restraining order, the minimum rates established by the Commission would have become controlling on December 5, 1955, and thereafter, upon permit carriers, for all kinds of United States Government traffic and for all United States Government Agencies, and the rail and certificated motor carriers would on that date have become bound, under California law, by their own tariffs,[14] by virtue of Section 494 (Appendix C, p. 31) and the amendment to Section 530 of the Public Utilities Code.

But the United States would have been free to set up in actions at law, in the United States Court of Claims, or in the United States District Courts, pursuant to 28 U.S.C., Sections 1346, 1491 (Appendix B, pp. 8, 9), by way of defense against the carriers' claims for payment of minimum or tariff charges, the same argument that it advanced before the District Court, namely, that the United States is not bound to pay minimum or tariff rates established by a State. Or, in the event that the State of California initiated any proceeding seeking to impose any sanction upon any carrier who charged the United States less than established rates, then the United States could intervene in such a proceeding and there set up the same argument, in which event such defense would be available to the carrier.

This want of equity in the United States is to be contrasted with the *irreparable and continuing* injury to com-

[14]Except possibly in a case where a rate in a tariff of a rail or certificated motor carrier was higher than the tariff rate of another such carrier, or higher than the minimum rate established by the Commission, in which case the lower rate could be charged under the proviso in the amendment to Section 530.

mercial carriers in California resulting from the action of the District Court.

It should now be assumed, in continuing the purpose of considering the preliminary question as it was presented to the District Court, that the Commission will prevail upon the ultimate question of whether California can regulate rates for the transportation of property of the United States Government.

The California Government Traffic Conference in its above described Petition for Modification No. 34 (R. 118), represented to the Commission, and the Commission in its Decision No. 51047 (R. 85) found, that: "Certain permit carriers have driven rates for the handling of [Government] shipments to a *depressed and unreasonably low level,* thereby creating chaotic transportation conditions in the movement of such goods. Such *depressed and unreasonably low rates* for government traffic are *depressing the revenues of the carriers* now and previously engaged in the handling of such traffic and if continued will create a burden upon other traffic."

The action taken by the California Legislature and by the Commission was calculated to remedy this condition by requiring carriers to charge the Government at the higher level of rates established in the tariffs of rail and certificated motor carriers and in Minimum Rate Tariff No. 2 unless otherwise authorized by the Commission. If the District Court had not issued its restraining order requiring the Commission to countermand its initial action, then, as of December 5, 1955, and thereafter, the carriers would have had not only the legal right but the legal duty

to assess and collect rates at such higher levels. *That right was forever and irrevocably lost when the Commission, in compliance with the District Court's restraining order, indefinitely suspended the cancellation of the deviation provision in Minimum Rate Tariff No. 2, and thereby continued, for an indefinite period of time, the opportunity for some carriers to hold rates at a "depressed and unreasonably low level."* When other carriers, in order to compete, assess these low level rates, and when, but for the District Court's order, they would have had a right and a duty to collect higher rates, it is clear that they have suffered and continue to suffer, irreparable injury. In view of the allegations in the complaint that ". . . in the year 1954 military traffic in California to and from and between the various installations located within the State amounted to 21,121,341 tons. The cost of moving the material was approximately 20 million dollars" (R. 2) it will be understood that the injury to the carriers is not only irreparable but is also of very great magnitude. The injury suffered since December 5, 1955 is irreparable; but the injury presently continues, and will continue to accumulate every day that the District Court's order remains in effect.

A balancing of these equities alone should have dissuaded the District Court from granting the relief requested by the complaint.

F. The District Court was required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship of the Government of the United States and that of the State of California.

In the Chronological Narration of Facts hereinabove set out (supra, pp. 10-21) the history of the events leading up

to the filing of the complaint was described. It will be convenient to recapitulate here the salient features of that history.

The record shows that on June 3, 1954, a group of carriers engaged in the transportation of property of the Armed Forces of the United States in California filed a petition with the Commission seeking relief from the cut-throat competition that had driven rates for such transportation to unreasonably low levels which had the effect of unreasonably depressing the revenues of the petitioners, with the likelihood of creating a burden on other traffic (R. 85); that the Commission attempted to cope with the problem but was forced to the conclusion that it could not be resolved without cooperation from the Armed Forces of the United States to insure the publicity of special rate quotations offered to the Armed Forces by rail and certificated motor carriers (R. 88); that the Armed Forces declined to cooperate (R. 131, 132); that the California Legislature then intervened and amended Section 530 of the Public Utilities Code; that the Commission then acted to implement that legislation (R. 90, 92), but at the request of the United States, postponed for 90 days the effectiveness of its action upon representations by counsel for the Government that the Department of Defense could accommodate itself to the new law "within a relatively short time" (R. 107); that, thereafter, the Commission declined the request of the Department of Defense for a second postponement of 60 days (R. 100, 101); that at the 11th hour, which, being on a Friday afternoon, was a very inconvenient hour, before the Commission's action was to take effect at 12:01 a.m. on the fol-

lowing Monday, the United States filed its complaint in the District Court seeking injunctive and declaratory relief (R. 1, 12), that not a single word appeared in either the complaint, the supporting affidavits, or the proposed written restraining order, about the prior proceeding before the Commission, or its decision therein, (R. 1-13), apparently out of fear that the question would be raised as to why the United States had not pursued its remedy before the Commission, and thence, if necessary, through the California courts; but that the local Assistant United States Attorney who presented the matter to the District Court apparently became aware of the Commission's decision in the prior proceeding and of its significance, and thereupon urged the District Court to take immediate action to arrest its effect (R. 265). He apparently believed that such action would maintain the *status quo*, and, therefore, urged it upon the District Court (R. 265).

The record further shows that counsel for the Commission then advised the District Court not only of the inconvenience to the Commission that would be involved in attempting to comply with a restraining order requiring affirmative action by the Commission, but also of the impossibility of obtaining the necessary action within the limited time available, and of the serious effect upon the rate structure that would follow upon any attempt the Commission might make to comply (R. 268, 269, 275, 276). Counsel for the Commission also advised the District Court more fully with respect to the prior proceeding before the Commission (R. 268-272), and pointed out that the United States could still fully protect itself by defend-

ing against suits by carriers for minimum or tariff rates (R. 270).

The District Court acknowledged that its order would cause confusion (R. 271); that the Government might have been dilatory in bringing the matter before the District Court (R. 271), and that the issuance of a restraining order would cause a "mechanical problem" to the Commission (R. 273), and cause financial loss to carriers (R. 273).

The District Court, however, persisted in its belief that a restraining order would maintain the *status quo* although advised by counsel for the Commission of the difficulties involved (R. 268, 273, 277).

The written restraining order issued by the District Court was entirely prohibitory in form, commanding inaction by the Commission (R. 11). The District Court orally stated, however, that the Commission was being ordered to take affirmative action to abate the effect of its prior order (R. 281).

Faced with the necessity of trying to resolve the ambiguity in the partly written, partly oral restraining order, and having no desire to run the risk of being in contempt of the District Court, the Commission, on Monday, December 5, 1955, sometime after 12:01 a.m., issued a new order countermanding its prior order (R. 102-104).

It has already been explained (supra, pp. 42-49) how a cloud of uncertainty was thus cast upon the rate structure for United States Government traffic in California, a cloud that will not be dispelled at least until the final determination of the present proceeding, and probably not for

many months or years thereafter, until a number of cases involving controversies over these rates have been tried and determined.

The most alarming feature of this sorry sequence of events is the Government's callous disregard of California's sovereignty as a state. First, the Armed Forces declined to cooperate in an attempt to remedy the serious abuses surrounding the transportation of its property. Then it appeared and participated actively in the proceeding before the Commission in which those abuses had appeared, and acquiesced in the Commission's proposed remedy for those abuses. Then, once more the Government changed its mind and sought the aid of a Federal court in nullifying what California had done. In taking this final step, the Government acted either in ignorance or in reckless indifference to the consequences to the rate structure. Its failure to say even a word in its complaint about the prior proceeding before the Commission indicates either that the Government was embarrassed by its participation in that proceeding and its acquiescence in the Commission's decision, or that it felt such a proceeding was beneath its notice, until it realized at the very last minute that enough attention had to be given to the Commission's order to get it countermanded. When that had been done, the Government then had the temerity to pretend that no such order had ever existed, and that the relief sought by the government was directed only against a statute (R. 156).

These events make it abundantly clear that the Government determined to repudiate its prior lawful conduct before the Commission, and to embark upon a course of

super-sovereignty, and to crush in the Federal court the offending state action, the provisions of the Tenth Amendment to the Federal Constitution, to the contrary notwithstanding. This is centralization and consolidation run riot. It is the erosion policy which, if upheld by this Court, will eventually extinguish all authority of the states in the field of commerce and trade.

It is equally deplorable that the District Court, either in haste or because of a too great receptivity to the representations of counsel for the Government, lent its assistance to this gross violation of the most elementary principles of comity existing between the State of California and the Federal Government.

This Court has frequently had occasion to express and apply the principle which requires that Federal Courts abstain from restraining, enjoining, or otherwise interfering with action taken by a State in the exercise of its sovereign powers. This principle is a corollary of the fundamental political principle underlying our dual form of government.

This "doctrine of abstention" has been well expressed by Mr. Justice Frankfurter in the case of *Railroad Commission of Texas v. Pullman Company* (1941), 312 U.S. 496, 500; 85 L. ed. 971, 974, as follows:

> ". . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . [citing cases]. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the

rightful independence of the state governments' and for the smooth working of the federal judiciary. [Citing cases.] This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

The principle was also applied in the case of *Alabama Public Service Commission v. Southern R. Co.* (1951), 341 U.S. 341; 95 L. ed. 1002, as follows (pp. 349-351; L. ed. pp. 1008, 1009):

"As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.

* * *

"This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. . .

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

The doctrine of abstention was also invoked in the case of *Pub. Serv. Comm. of Utah v. Wycoff Co.* (1952), 344 U.S. 237; 97 L. ed. 291. In this case the late Mr. Justice Jackson said (p. 247; L. ed. p. 298):

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system . . . We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 89 L. ed. 1725, 65 S. Ct. 1385. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. . . ."

Another case in which this doctrine was applied is *Public Utilities Comm. v. United Air Lines, Inc.* (1953), 346 U.S. 402; 98 L. ed. 140, in which United Air Lines, Inc., filed a complaint in the District Court against the Public Utilities Commission of the State of California, and in which *the United States (Civil Aeronautics Board) intervened as a party plaintiff*. The complaint alleged that the Commission was attempting to regulate commerce that was alleged to be within the exclusive jurisdiction of Congress. The requested declaratory and injunctive relief was granted in the District Court by a three-judge Court. On appeal to this Court the judgment was reversed by a *per curiam* decision upon the authority of the above cited case

of *Pub. Serv. Comm. v. Wycoff Co.* (1952), 344 U.S. 237; 97 L. Ed. 291.

The judicial policy underlying this doctrine of abstention is the same as the Congressional policy expressed by the Johnson Act, although not confined to cases in which the Johnson Act is applicable. (*Alabama Pub. Serv. Comm. v. Southern R. Co.* (1951), 341 U.S. 341, 350; 95 L. ed. 1002, 1009.)

Other cases that recognize and apply the doctrine of abstention are *Burford v. Sun Oil Co.* (1943), 319 U.S. 315; 87 L. ed. 1424, and *Spector Motor Service v. McLaughlin* (1944), 323 U.S. 101; 89 L. ed. 101.

For all of the foregoing reasons, the District Court should not have entertained the action but should have granted the Commission's motion to dismiss.

Instead, the District Court, in haste and without careful consideration of the consequences, frustrated the efforts of the State of California to remedy what was found to be "chaotic transportation conditions" in the large scale movement of government traffic at "depressed and unreasonably low rates," with the threat of a "burden upon other traffic."

The nullifying of such efforts with such a heavy hand was an infringement of the gravest character upon the sovereignty of the State of California, and resulted in incalculable confusion and damage to the transportation industry in California.

This offense was especially grievous because it was unnecessary.

II.

ANALYSIS OF RECORD SHOWING THE DISTRICT COURT'S ERRORS AT THE TRIAL, IN ITS FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT.

Before taking up the matters that developed at the trial, the Commission desires to emphasize a point of fundamental importance in a consideration of what is to follow.

This case arose out of a challenge by the United States of the constitutionality of a particular California Statute, namely, the amendment of Section 530 of the Public Utilities Code. The Commission submits that the ultimate issue in the case is whether or not this particular statute is constitutional. The reasons for urging that the ultimate issue should be thus narrowed have already been suggested in part, namely, that the constitutional question can arise in various ways with a variety of aspects, and that it should be decided only in a specific context.

The Government, however, in numerous ways, which will be illustrated hereinafter, has made clear that it seeks to enlarge the frame of reference for this case and to challenge the constitutionality of *any statute whatever* that purports to empower a state to regulate, *in any manner whatever*, rates for the transportation of property of the United States, no matter how benevolent the statute may be or how little it would impinge upon the United States.

A. The District Court erred in overruling the Commission's objections to questions calling for expressions of opinion by the government witnesses upon the ultimate issues in the case.

At the trial, the Government immediately made it clear that it intended to throw the full weight and power of the military forces into its attack on state power. Its first witness was Edmond C. R. Lasher, Brigadier General,[15] United States Army, Assistant Chief of Transportation of the Army for Traffic, who represented the Department of Defense as well as the Army. He was followed to the stand by George A. Hall, Lieutenant Colonel, Transportation Corps, United States Army; Herbert C. Chambers, Colonel, United States Air Force; Gordon W. Bengtson, Lieutenant Commander, Supply Corps, United States Navy; Walter H. Eastham, Lieutenant Colonel, United States Marine Corps; Andrew Paul Flanagan, Lieutenant Colonel, Transportation Corps, Regular Army; and by the civilian assistants to these military officers.

As might be expected, considering the amorphous and contingent nature of the Government's case, the testimony of these witnesses consisted largely of alarums, loose generalizations, argument and inspired speculation.

As already stated, many of these witnesses were permitted, over objection by counsel for the Commission, to answer questions calling for expressions of opinion as to the effect of state rate regulation upon the United States military establishment. Such opinions were allowed and expressed although the witnesses admitted to having little or no knowledge of the California law, or of the conditions

[15]It is believed that General Lasher has been promoted to Major General since the trial of this case.

surrounding Government traffic in California. (R. 387, 388, 393, 394, 492, 596.)

It is not surprising that they predicted dire consequences to follow upon state regulation, as will be shown hereinafter.

The Commission does not propose to argue at length the narrow legal question of the admissibility of such evidence. The District Court's leniency, however, had harmful consequences, resulting in its being unduly alarmed and swayed by the zeal of these uniformed, high-ranking military officers, even though cross-examination made it clear, as will be demonstrated hereinafter, that there was little if any substance in the fears they expressed.

Thus, the District Court, opening its opinion with a ringing military note, quoted "To git thar fustest with the mostest men" as "the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader," and found the "wisdom in that dictum" still applicable "In this atomic age . . ." (R. 200.) The District Court then referred to the Government's "parade of witnesses whom we have found to be impressive," saying that "most of them were in the Department of Defense, one of them being a brigadier general of the Army," and that "those witnesses were most emphatic in declaring that the application of Section 530 to military freight shipments would be costly and time-consuming, and would have a 'chaotic' effect upon the defense activities of the United States." (R. 201.)

In another place, General Lasher was referred to as an "impressive witness," and a large part of his testimony

was quoted in the District Court's opinion, including dramatic but wholly irrelevant narratives of the General's experiences in Korea "as we raced north to the Yalu River," and his conclusion that state regulation would result in "an administrative *morass* out of which we would never fight our way, *we would never win the war!*" (Emphasis by District Court.) (R. 207, 210, 211.)

Colonel Hall was quoted as having testified with respect to state rate regulation: "Well, I can't imagine operating under such circumstances. *The situation in my office would be* COMPLETELY CHAOTIC * * *" (Emphasis and extreme emphasis by District Court.) (R. 215.)

Also quoted was his testimony about his "experience in Europe" with the methods of "a trained intelligence worker, espionage worker, ..." (R. 216.)

Reference was made to the testimony of Colonel Flanagan "giving only 'the skeleton facts' of a certain secret movement, *and which was still taking place at the time he was testifying.*" (Emphasis by District Court.) (R. 217, 218.)

All the other military officers were also quoted at length by the District Court in its opinion. (R. 218-221.) Thereafter, the District Court indicated very plainly the great weight it attached to the speculations of these military men by saying "How the application of Sec. 530 would 'hamper and hinder' the plaintiff in carrying out its Constitutional functions has been clearly shown by the testimony of high-ranking officers of the Armed Services." (R. 232.)

Having been thus conditioned and alarmed by the testimony of these witnesses, skillfully and dramatically

colored as it was by descriptions of war time emergencies, the District Court, near the end of its opinion, in distinguishing the case of *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania* (1943), 318 U.S. 261; 87 L. Ed. 748, said that "there is a constitutional difference between a can of milk and a hydrogen bomb!" (R. 235.)

In conclusion the District Court said, in part, "In a dictatorship, the war lords do not even *demand*—much less *request*—authority to negotiate with private parties for the supply of their war needs. Autocrats *take* what they want!

"It is therefore a heartening spectacle, in a Constitutional democracy, to see a group of military men, speaking for the sovereign itself, appear in a civil court to *plead* to be allowed to carry out their constitutional functions by being permitted to contract freely with privately-owned carriers to supply the Government's transportation needs." (Emphasis by District Court.) (R. 236, 237.)

It is not easy to define the peculiar quality of these words, but we respectfully suggest that they plainly manifest a misunderstanding of the true relationship which exists between the civil power and the military power. Could there be any possible question as to the subordination of these military officers to the authority of the Federal judiciary?

We can perceive no compliment due to military officers, however exalted in rank, for obeying the supreme law of the land and rendering themselves amenable to the lawful processes of the administration of justice.

B. The United States did not prove at the trial that it would suffer irreparable injury in the absence of injunctive relief.

At the time the Government rested, the Commission renewed its motion to dismiss on the ground that the Government had failed to make out a prima facie case (R. 619). The motion was again denied (R. 619). After all the evidence was in, the Commission once more renewed its motion (R. 724). It was again denied in effect by the District Court's Conclusions of Law I, II, III, and its Judgment (R. 253, 256); and the District Court's opinion and findings of fact make it clear that it found that the United States would suffer irreparable injury if the requested relief were denied, and would be unduly burdened by state regulation (R. 232, 234, 237, 247-252).

The Commission submits, however, that a careful analysis of the record, and a judicious weighing of the evidence will show no such injury or burden.

The substance of the reasons given by the Government witnesses for their opinion that state regulation of the rates of commercial carriers for the transportation of property of the United States would be harmful to the United States, may be fairly condensed as follows: (1) the increased cost of transportation thus regulated; (2) delay in transportation; (3) impairment of security. Additional, more vaguely expressed reasons were: (4) difficulty in distinguishing interstate and intrastate traffic; (5) Government traffic differs from commercial traffic; (6) California interests would suffer from state regulation; (7) the present system of negotiating rates is a good system; and finally (8) the mere existence of any state power whatever is onerous.

In considering the evidence pertaining to these grounds, it is important to bear in mind that the Government proceeded at the trial as if the amendment to Section 530 had never become effective, and a large part of the testimony of its witnesses consisted of *speculation as to what would happen* if state regulation should become effective.

Among the reasons given by the Commission in an earlier part of this brief for objecting to the District Court's entertaining the complaint, one was that the District Court did not have before it a specific context arising out of an actual specific transaction, or series of transactions, that had in fact occurred, and that would enable the District Court to see the actual effect of a specific state regulation. The soundness of this reason is abundantly demonstrated by an analysis of the "evidence" in the present case. Freed of the rigors that would be imposed by the necessity of testifying to the facts of actual transactions (except for a few carefully selected "examples"), and encouraged by the leniency of the District Court in its rulings upon objections to proposed testimony, the Government witnesses gave full rein to their zeal and imagination.

(1) The alleged increased cost of regulation.

The Government's evidence was that its transportation costs would be increased for the reasons that rates established by California for commercial shippers would produce higher charges than those paid by the United States under negotiated rates (R. 384, 447, 514, 531, 564, 574); that commodity rates would not be available (R. 378, 485);

that there would not be available any FAK[16] rates (R. 447, 512); that rates could not be made effective by the Commission retroactively, i.e., after moves had taken place (R. 406, 407); and that there would be a need for more personnel to classify and rate shipments under established tariffs (R. 385, 513, 535, 574).

Some of the evidence referred to above consisted of descriptions of certain shipments that had actually occurred and that were called "representative" or "typical" examples or "illustrations" of Government shipments (R. 531, 566, 567).

A close look at the evidence shows, however, that these shipments were not representative, but were deliberately selected in order to show, in extreme form, differentials between the charges computed under special rates and those computed under established rates. Thus, it appears that out of 11 examples of movements with respect to which lower rates were said to result from special rates than from established rates (R. 531, 532, 563, 567, 585, 586, 575, 576, 580, 581, 599), 7 were truck movements, of which 6 were performed by a single carrier, All State Transportation Company, although there are approximately 80-100 carriers engaged in carrying United States Government property in California and as many as 15,500 having operating authority to do so (R. 649, 693). Of the 3 movements selected, he said, "at random" by the Witness Broz, all 3 were performed by All State Transportation Company, although Mr. Broz testified that the

[16] "Freight all kinds", a single rate for a mixed shipment, i.e., one consisting of a variety of kinds of property (R. 452).

Air Force, which he represented, used 60 to 80 different carriers in California (R. 575, 576, 580, 581). All State Transportation Company is one of the principal rate cutters carrying Government property in California (R. 972-977).

The conclusion seems irresistible that All State Transportation Company's cut-rate hauls were purposefully selected, and are not by any means representative.

There is another remarkable feature about these allegedly "representative" shipments. Although 3 of the Government witnesses testified that subsistence (food) was the largest or one of the largest in volume of any kind of commodity shipped by the Government in California (R. 388, 432, 522), not a single example was offered to show a comparison between established and special rates for this kind of commodity. The Witness Stallings on cross-examination give away the reason why no such example was cited, which is that there is little if any difference between established and special rates for this kind of commodity. The following testimony of this witness is illuminating:

> "Q. You didn't feel it necessary to show a bill of lading respecting that kind of goods [i.e. subsistence food supplies]?
>
> A. No, because in most instances the commodity rate is very close if not the same as the rate tender.
>
> Q. Yes. It didn't suit your purpose to show one where the rate was approximately the same, did it, Mr. Stallings?
>
> A. We have examples where it's approximately the same. I don't happen to have them with me, but in our study we made quite a number of them. We were

trying to show you *representative shipments that would be affected by the minimum rate.*" (R. 568).

Commodity vs. Class Rates.

An important part of the testimony pertaining to the cost of transportation of Government property was concerned with the difference between commodity and class rates. The Government's witnesses repeatedly expressed the fear that under state regulation their traffic would become subject to class rates which produce higher charges than commodity rates, there being no established commodity rates available to the Government for its traffic (R. 378, 485). Several examples were given of shipments moved under negotiated rates that would have produced substantially higher charges under established rates (R. 563, 564, 599).

There is good reason to believe, however, that the Government has greatly overstated this fear of increased cost under regulation. In addition to the candid disclosure by the Witness Stallings already described the evidence shows that there are presently established in California "literally thousands" of commodity rates (R. 676). Many of these rates are presently available for commodities presumably shipped in large quantities by the Government, such as canned goods; paint; roof, building and paving materials; rubber goods; wire; plumber goods; soap; petroleum products; drugs; coffee; iron or steel goods; sugar (R. 984-986); and undoubtedly many more. These rates generally cover areas, and are not restricted to narrowly defined geographical points (R. 678, 679). The evidence shows, moreover, that in California, at least, large

quantities of Government traffic move between the same points as large volume commercial shipments, such as San Francisco-Oakland to Los Angeles (including Long Beach and San Pedro), and San Francisco-Oakland to San Diego (R. 510).

This evidence pertaining to presently established commodity rates, and the pattern of movement of large quantities of Government freight, sharply conflicts with the allegations of the complaint (R. 3), and with the testimony of some of the Government witnesses that Government traffic is different from commercial traffic (R. 370, 371, 445, 485, 569). The fact is that a large (but unknown) percentage of Government traffic has the same transportation characteristics as commercial traffic.

The observation just made suggests another serious deficiency in the Government's case, a deficiency that will be referred to again hereinafter. It is the failure to produce any kind of *comprehensive analysis and summary* of Government bills of lading that have actually been issued by carriers for California intrastate traffic over some recent representative period of time. The Commission submits that such a summary is absolutely essential to an understanding of the characteristics of Government traffic and how it would be affected by state regulation. Such a study would have disclosed, *among many other things,* to what extent, *presently established* commodity rates would be available to Government traffic. There is evidence that such studies were in fact made by the Government, *and for the very purpose of ascertaining how its traffic would be affected by regulation* (R. 569). *But these studies were not offered in evidence* as such; only selections were made,

to show "the places we would be harder hit" (R. 582), from which it is reasonable to infer that the studies as a whole would not have confirmed the allegations of the complaint. Nor would this be at all surprising. *With peace time conditions prevailing as at present*, there is a strong probability that a very high percentage of Government traffic is just like commercial traffic in terms of kind of commodity, termini, and availability of commodity rates.

It goes without saying that the burden was upon the United States as the complainant to produce such a traffic summary, and not upon the Commission as defendant.

But there is more to be said about commodity rates. If there are instances in which there are no presently established commodity rates for Government traffic, either because of the location of the termini or because of the nature of the commodity, the reason is, as explained by the Commission's Witness Mulgrew, that there has not heretofore been any need for establishing commodity rates for such traffic, which has in the past been exempt from regulation, and which has moved under special rates (R. 688). But that does not mean that suitable commodity rates for the Government could not or would not be established. On the contrary, the Witness Mulgrew, after explaining the theory of the commodity rate as being one established at a lower level than the class rate "where there are more favorable transportation conditions prevailing," stated in substance that the Commission in the past has been receptive to representations from interested groups who have requested the establishment of commodity rates; that a number of such rates have been established by the Commission; that such rates have been tailored to

suit the needs of commercial shippers for the reason that "We have not had any experience with Government traffic because, in effect, of the total exemption of that traffic from our rate regulation"; that there have not been any requests for the establishment of commodity rates for the United States Government, nor any reason to inquire into the reasonableness of any commodity rates for the Government; that the fact that some Government installations are located at a distance from a metropolitan center presents no reason whatever why commodity rates cannot be established for Government traffic to or from those installations; and that special rates could be approved without a public hearing (R. 687, 688, 693).

Of the remaining 4 of the 11 "representative" examples of Government shipments given by the Government witnesses, all were concerned with articles that only a military organization would ship in large quantity, viz., radar, tanks and heavy guns, mounted guns, ammunition (R. 563, 564, 585, 599), and it certainly would not be surprising that there are no established commodity rates for such articles, if that is the fact. The tanks and heavy guns moved from Camp Pendleton to 29 Palms, which is a desert training area in Southern California (R. 563), a fact which would make the absence of an established commodity rate, if that was the fact, even more understandable. The mounted guns, moving interstate from Ohio, and the small arms ammunition, moving from Arizona to Utah, were entirely irrelevant to a consideration of the effect of a California law upon Government traffic.

In the light of the foregoing, it will be seen that the "typical" examples of Government traffic given by the

Government witnesses to show the alleged high cost of regulation, are not only pitifully inadequate for that purpose, but also are grossly misleading in creating the impression that peace time Government traffic is all guns and no butter.

"Freight All Kinds" Rates.

The alleged nonavailability, under regulation, of FAK rates, was another reason expressed by a number of the Government witnesses for their conclusions that state rate regulation would unduly burden the United States. The peculiar advantages of such rates were said to be that they enabled the Government to consolidate large volume mixed shipments into truck load lots, without separately classifying the component items, and to move them at a single truck load rate uniformly covering all items in the shipment, thereby saving time and money (R. 452, 453, 460-462).

In order to demonstrate the increased cost said to result from regulation, and from the alleged nonavailability of FAK rates, the Government first offered testimony pertaining to the time needed by shipping personnel to perform the paper work involved in a shipment of Government property. Reference was made to "a study to see how much increased time it would take to do the paper work in order to comply with the Commission's minimum rate classification" (R. 533). Testifying as to "the results of that study" a Government Witness (McKinney) stated as follows:

> "A. The report received from the shipping activity indicates that it would take them an additional 13 hours *to completely describe* the various items on the

bill of lading for classification and rating purposes. In support of that I might explain our present method of billing under the freight all-kinds. For the rate to apply, the present rate tender, it is only necessary for the shipping activity to indicate *a brief generic description of the article, chiefly for identification purposes at destination,* checking with our invoices. This activity reports that it takes a maximum of four hours to prepare a bill of lading of this length, which contained 36 continuation sheets and 550 pieces, and by *completely describing*——

Q. How many pieces?

A. 550. *Completely describing* these various items *to comply with the classification description,* then, for rating purposes, they estimated it took 17 hours and 15 minutes, or 13 hours additional time." (R. 533, 534).

On cross-examination, the bill of lading that was the subject of this so-called "study" was produced, and it appeared that it was issued on February 29, 1956, upon a shipment originating at Naval Supply Center, Oakland, consigned to a naval repair facility in San Diego, California, consisting of 550 pieces, weighing 41,788 pounds, described as 218 items, on 36 pages, and accepted upon a special rate tender providing for a "freight all kinds" rate. This document was later offered in evidence by the United States and is a part of the record as Exhibit 6.[17] This exhibit consists of an office memorandum, dated February 29, 1956, "Subject: Classification Time Study," addressed to the Officer in Charge, Navy Central Freight

[17]Only portions of this document have been printed as a part of the record (pp. 774-777), but, pursuant to stipulation of counsel, the whole may be referred to (R. 987).

Control Office, from the Freight Terminal Officer, "in reply to your recent verbal request" (only a short time before the trial, which began on March 19, 1956 (R. 361)). The bill of lading referred to was attached as enclosure (1). Also attached to this office memorandum was enclosure (2) which showed, according to the Witness McKinney, that 17 hours and 15 minutes was necessary for "completely describing these various items to comply with the classification description."

There are good reasons for believing, however, that the Government overplayed this hand. In the first place, the bill of lading in question shows on its face that it is a Government Bill of Lading prepared upon Standard Form No. 1103a, a form approved by the Comptroller General of the United States; and that this form has printed under the words **"Description of articles"** the following instructions: **"Use carriers' classification or tariff description if possible, otherwise a clear nontechnical description."** The words "carriers' classification" plainly refer to those standard classifications such as the Western, Official, Southern Classifications, and National Motor Freight Classification, that have been filed with the Interstate Commerce Commission and other regulatory bodies, and widely adopted by common carriers for use in connection with their tariffs *and special rate quotations* (R. 630), and by state regulatory bodies for use in connection with minimum rate tariffs.[18]

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[18]For example, Item 50 of the Commission's Minimum Rate Tariff No. 2 provides as follows: "This tariff is governed to the extent shown herein by the Western Classification and the Exception Sheet."

It thus appears that Government practice requires that all Government freight to be shipped by common carriers be described in the terminology of the standard classifications where possible, and that only in unusual instances when the commodity in question cannot be described in such terminology is some other kind of description allowed. And there is good reason for this requirement. It enables the various regional freight control offices of the various shipping agencies of the United States, and finally the General Accounting Office, to make comparisons between established rates and special Government rates. Such comparisons are frequently made (R. 461, 462). The Comptroller General has ruled that the United States will not pay more than an established tariff rate if that is less than a specially quoted Government rate. 35 Comp. Gen. 681, relying upon *Missouri Pacific Railroad v. United States* (1931), 71 Ct. of Claims, 650, 661; *Illinois Central Railroad v. United States* (1923), 58 Ct. of Claims 182. *Moreover, most military traffic presently moves under established tariff rates* (R. 377, 395), *making it necessary to use descriptions contained in the standard classifications.*

It would seem, therefore, that the witness McKinney's method of using "a brief generic description" of the articles was a departure from standard Government practice. Whether or not this departure was authorized by his superiors does not appear in the record. In any event, Department of Defense regulations now require of procurement officers purchasing property "a complete description of the commodity being purchased, . . . *for subsequent freight classification purposes.*" 32 CFR, 1956 Supp., 1.306-4 (Appendix B, p. 21).

There is a further reason for doubting the conclusions of the Government witnesses with respect to this "study" of the bill of lading referred to above. Certain other bills of lading representing certain other Government shipments were received in evidence as Exhibits 3, 4, and 5 (R. 764-772; only portions of these exhibits have been printed as a part of the record). Descriptions of these shipments were offered by the Government not for the purpose of showing how long it took to do the paper work but for another purpose that has already been referred to above, namely, to show how much more the Government would have to pay under rate regulation. But it was necessary, nevertheless, to classify the items in these bills of lading by reference to the appropriate standard classification, in order to ascertain the charges resulting from the application of established rates; and these exhibits show how much time was spent in such classification.

It is very instructive to compare these classification times with the classification time shown on Exhibit 6. Thus, Exhibit 3 shows a total of 94 items, and 25 minutes as "man hours spent in classification, NCFCO,"[19] or approximately 3½ items per minute. Exhibit 4 shows a total of 171 items and 2 hours and 50 minutes classification time by NCFCO, or approximately 1 item per minute. Exhibit 5 shows a total of 30 items and 10 minutes classification time by NCFCO, or approximately 3 items per minute. The average for these 3 bills of lading was approximately 1½ items per minute. On the other hand Exhibit 6, the basis of the "classification time study,"

[19]Navy Central Freight Control Office.

shows 226 items on enclosure (2), and 14 hours for classification by NCFCO, or approximately *3½ minutes per item*. This means that it took more than 5 times as long to do each item for the "study" as for those items that were classified in the other bills of lading for another purpose.

Yet it is this "study" that served as a basis for the conclusion of the Witness Bengtson that under rate regulation shipping activities "would be required to beef up their sections where they classify the shipments" by "approximately 50 per cent" at an additional cost of "approximately $25 a truck load" (R. 513, 514).

Commander Bengtson's zeal carried him even further. He said that "these 13 hours [i.e., those reflected by the "study" as additional hours needed for classification] represent strictly operating hours before the shipment could get underway, and those additional man hours represent for all purposes a delay before the shipment could be made"; that such a delay might be "crucial for operational purposes in the Navy"; and that it might result in a ship's not sailing, or "leaving port without the items on board" (R. 513).

Although much of what the Government witnesses said about FAK rates is misleading, the subject is an important one and needs to be examined with care. There is no doubt that carriers have quoted FAK rates to the Government and that such rates have been used to a substantial extent in calculating charges for transportation of Government property. But this is another area in which no reliable information has been presented by the Government. The record does not show the proportion of the

total Government traffic in California to which FAK rates are presently being applied, and so it cannot be ascertained from this record what is the extent of the benefit the Government presently derives from these rates. (See Record pp. 668, 669.) This is another deficiency in the Government's proof that might have been supplied by the kind of comprehensive analysis and summary of Government bills of lading that has already been referred to above. As presented, the Government's evidence was grossly inadequate to show irreparable injury from being deprived of the use of FAK rates. Moreover, the Government's case assumes that it would be permanently deprived of FAK rates for all purposes under California regulation, an assumption that has no basis in fact.

To whatever extent FAK rates may be presently used, and whatever may be their merit or evil in principle, the evidence shows that in practice they have been abused, not only in California but elsewhere as well. The Witness Loretz, called by the Commission, testified at length upon a study he had prepared pertaining to FAK rates in California (R. 633-644, 971-982). He showed how there has been a steady deterioration of FAK rates between certain important shipping points in California since October 1953, a period of time when the rates prescribed by the Commission as minimum were increasing in response to the increased cost of carrier operations (R. 640). He made it plain that he was not unqualifiedly condemning the principle of the FAK rate, and that he thought such rates had some merit as applied to military traffic, making it possible, for example, to move, at a single rate, an entire division with its military impedimenta, where the carrier would take the high rated articles along with the low

rated, and it would average out (R. 638, 639); but that FAK rates had been abused by the Government and carriers in California by applying them to shipments for which they were not appropriate; that the Government has taken advantage of low *established* commodity rates when they are available for low rated Government commodities, such as canned goods or iron and steel, and made use of special reduced FAK rates for high class freight such as circuit breakers and scientific instruments which appeared in one of the actual shipments offered by the Government as an example (R. 645, 646, 666, 667).

It seems clear from the testimony of this witness that it was the serious abuse of FAK rates in California that led to the commencement of the proceeding before the Commission in 1954, and that it was the Government's desire to continue its enjoyment of these depressed rates that led to this litigation.

Some of the Government witnesses, including General Lasher, admitted that there are abuses attending the indiscriminate use of special rate quotations induced by competition (R. 422). General Lasher also added "this abuse is very difficult to eradicate" (R. 422).

Retroactive Rates.

A number of the Government witnesses described the advantages to the Government in the privilege of negotiating special rates with carriers after movements had taken place, with the understanding that such rates would be effective retroactively, thereby avoiding the application of an established rate that might produce higher charges (R. 406, 407, 586, 597). It is not denied that such a privi-

lege is a valuable one, and a desirable one under certain circumstances, as for example, where a rate has not previously been established and where time is of the essence and does not permit the negotiation or establishment of an appropriate rate before a move takes place. But it seems very probable that such movements would be limited to occasions when, as a result of a decision by a military commander, transportation was needed at an unexpected time, or to an unexpected place. *In peace time*, such movements probably do not represent a very large percentage of the over-all Government traffic. Again, the Government has not supplied any data from which reliable conclusions can be drawn.

In any event, conceding that retroactive rates are peculiarly advantageous to the United States in certain circumstances, *there is no reason to believe that the Commission cannot or would not authorize them.* The Commission's Director of Transportation, the Witness Mulgrew, stated that he recognized in Section 530 of the Public Utilities Code, as amended, a legislative policy to give the United States Government, as well as state and local governments, preferential rates, and that in his opinion rates for Government traffic could be made effective retroactively just as under the present system (R. 687, 689).

At least, the California Supreme Court should be given an opportunity to pass upon the question, if there is any doubt about it. This is an important instance of the need, as discussed in an earlier part of this brief, of permitting the California Supreme Court to interpret the California statute, and to pronounce authoritatively upon the extent of the Commission's powers thereunder.

Need for More Personnel.

The use of Exhibit 6 by the witness Bengtson as a basis for his opinion that rate regulation would require an increase in personnel and cost, has already been discussed. Other Government witnesses expressed the same opinion, with no better foundation (R. 385, 535, 574).

The fact of the matter is that modern transportation is a complex business, and it is not at all simplified for the Government by the use of special rate quotations. General Lasher's testimony and other evidence in the record show that the various agencies of the United States Government, *under the present system,* maintain large transportation organizations, including staffs of skilled rate men, making use of tariff libraries containing thousands of tariffs and special rate quotations (R. 396, 397, 405, 503, 578, 915-920). Many special rate quotations are constructed in the same form as established tariffs, containing explanations of abbreviations and technical terms, references to governing publications, sections indicating the application of the rates, and providing for ancillary service, such as dunnage, extra labor, etc., minimum charges, restrictions in routings or service, exceptions to the governing classification, a class rate section, a commodity rate section and FAK rates (R. 629-631).

So far from simplifying the task of rating Government shipments, the availability of special rate quotations is far more burdensome to Government personnel responsible for routing and rating shipments than would be the non-availability of such rates, for the reason that under the present system such personnel are required to use the lowest available rate, whether it is to be found in an

established tariff or in a special rate quotation, and are therefore required, as General Lasher admitted, to be familiar with, and be able to use, both types of publication (R. 397).

(2) The alleged delay in transportation under regulation.

A number of the Government witnesses expressed the opinion that rate regulation would cause delays in Government transportation. Reference has already been made to Commander Bengtson's absurd statement that the sailing of ships might be prevented or delayed by the necessity of classifying commodities by reference to the standard classifications. Even more absurd was the opinion expressed by Colonel Hall that under rate regulation, the Government would have to come to the Commission *before making* a certain move involving ammunition boxes (R. 459). Colonel Chambers, although admitting he was not a transportation expert, dramatically emphasized the need for speed in the Air Force and said that interference with such speed by state regulation could not be tolerated (R. 496, 499, 502). On cross-examination, however, he showed much confusion in his understanding of the problem by saying that *under regulation* "We would be *required to negotiate* most of our shipments, the rates of our shipments. That in itself would constitute a delay, which in the Air Force we could not tolerate." (R. 505). Colonel Eastham said California regulation "would require a slow down in our movement of freight. It would cause, as has been explained here, time after time, that the classification would be required." (R. 560).

The Government witnesses never succeeded in making clear just how regulation of the rates of carriers would cause delays in the transportation of Government property. And the Government witness McKinney, who, testifying on his direct examination in support of the so-called classification time "study", said that it showed that 13 additional hours would be needed in order to meet the requirements of the standard freight classification, and that "during all of these additional 13 hours required for this additional work, that shipment would still remain on the shipping activity floor * * * before you could give routing instructions to the shipping activity", finally admitted as follows, on cross-examination:

> "Q. In those cases where the shipment is urgent, under those circumstances you would not allow the shipment to remain for 13 hours, would you?
>
> A. No, not in every case; no.
>
> Q. You would ship it out first and [ascertain] the rate later, wouldn't you?
>
> A. We could take out these urgent items and ship them and hold the remainder.
>
> Q. So that for those shipments with respect to which time is of the essence, the rating process is not permitted in your present practice or contemplated practice, to hold back a shipment, is it?
>
> A. Generally speaking, no." (R. 533, 534, 548-550, 552).

(3) The alleged impairment of security.

A third reason expressed by many of the Government witnesses for their objection to rate regulation was that such regulation would impair the national security by requiring disclosure of information pertaining to the

movement of classified materiel (R. 384, 417-420, 450-452, 490, 514, 515, 534, 561, 565, 576-578, 599-602).

The Commission desires at once to emphasize that it is fully aware of the necessity of preserving the national security, and has no intention or desire to promulgate any rate, rule or regulation whatever that would tend to undermine that security. The Commission concedes that there are movements, from time to time, of highly sensitive and classified articles with respect to which shipping data should not be disclosed. Nor does the Commission have any intention or desire to substitute its judgment for that of responsible Federal officers in determining what transactions involve the national security. The Commission desires also to state to the Court the opinion of its Chief Counsel that under Section 530 of the Public Utilities Code, as amended, it has the power to grant complete immunity from regulation of any kind to the transportation of any and all property of the United States which, in the opinion of responsible Federal officers, involves military or national security.

If there is any doubt about such power under the statute, then at least the California Supreme Court should be given an opportunity to say whether or not such power has been thus granted to the Commission.

Nevertheless, the Commission cannot forbear suggesting that the military officers who testified for the Government in the District Court overstressed the danger to security that would follow upon rate regulation. Colonel Hall, for example, said that "really over a period of time every military shipment is in a sense a security shipment", and,

to prove his point, referred to his "experience in Europe" and to the methods of "a trained intelligence worker, espionage worker", although he had previously testified, with respect to the depot for which he was responsible, that "one of our big businesses at Sharpe General Depot is canned goods—subsistence" (R. 431, 432). It is difficult to understand how movements of canned goods between military installations in California *in peace time;* can involve the Nation's security.

Furthermore, it ought to be pointed out that the Government witnesses described several ways now in use, which would also be available under rate regulation, to effectuate the movement of classified materiel without any disclosure of shipping information to unauthorized persons.

One method was the use of military vehicles (R. 418, 419); another was the outright leasing of vehicles from commercial carriers (R. 418); another was the so-called exclusive use rule presently contained in commercial tariffs, which, like a lease, would give the Government exclusive use of commercial vehicles (R. 661).

In any event, whatever may be the nature and volume of the movement of classified materiel, and whatever methods may be available to the Government to avoid violations of security, there is no valid ground for fearing that the amendment to Section 530, or Commission action thereunder, presents a threat to the Nation's security in view of the avowed intention of the Commission's chief counsel to advise that the Commission can completely exempt security traffic from regulation (R. 700, 701).

(4) Interstate vs. Intrastate Traffic.

The necessity of recognizing, under regulation, the legal distinction between interstate and intrastate transportation was given by some of the Government witnesses as another reason for opposing such regulation. It was said that large quantities of goods come to California from outside the state, and that large quantities originating in California are transported outside the state; and that goods originating from various sources, both within and without the State of California, are commingled in depots and not segregated by points of origin (R. 435, 436, 439, 440). These things are doubtless true, but it is not understood how they present any obstacle to California regulation of the rates for transportation between points in California. It was said that it was difficult to distinguish between interstate and intrastate traffic (R. 383, 439, 440). Apparently the Government witnesses were laboring under the misapprehension that if an article is produced outside California then any subsequent movement of it whatever in California is intrastate in character. Thus, General Lasher said "We do not know when an item starts out on its journey from the processor whether it is going to be consumed in North Dakota or Florida or Cambodia." (R. 383). The General seemed to look upon interstate character as something that irrevocably attaches to an *item* under certain circumstances, and which can never be lost thereafter, rather than as an aspect of a particular transportation *movement*. Colonel Hall expressed the same idea when he said "We do not know what our materiel is. As stated, we have our interstate and intrastate materiel so commingled

that we could not possibly segregate it.", and that to determine "what materiel was in fact interstate and what was intrastate" for purposes of Commission rate regulation, "would just be impossible at the present time." (R. 441, 442). These witnesses apparently were not familiar with the principle laid down by this Court in cases like *Gulf, Colorado & Santa Fe R.R. v. Texas* (1906) 204 U.S. 403; 51 L. ed. 540, and *Baltimore & Ohio R.R. v. Settle* (1922) 260 U.S. 166; 67 L. ed. 189, which make it clear that when property has been carried from one state to a point in a second state where the carrier relinquishes possession, and thereafter the property is carried to another point in the second state, the second movement is in intrastate and not interstate commerce. Whether or not the property is commingled, during its period of rest in the second state, with other property originating within the second state, is immaterial. As could be expected, Colonel Hall was unable to point out any California law that would require segregation of property according to origin point (R. 454).

However extensive the practice may be of commingling goods in depots, without respect to their points of origin, a segregation takes place when goods are appropriated to a specific requisition (R. 526, 527), and thereupon the interstate or intrastate character of a contemplated shipment is ascertained. Under rate regulation, the applicable rate could thereupon be likewise ascertained.

It is true that once in a while commercial shipments are made under such circumstances that it is not easy to determine whether the transportation was in interstate or intrastate commerce, and, therefore, whether rates estab-

lished by the Interstate Commerce Commission or by a state regulatory agency are appropriate. And it is possible that such shipments are made by the Government from time to time. But the number of such shipments is probably not large in proportion to the total shipments made by the Government, and in any event the staffs of skilled rate men presently maintained by Government agencies, and the General Accounting Office, and finally, if necessary, the Federal Courts, should not find these occasional problems insoluble.

"Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent." *Davies Whse. Co. v. Bowles* (1943) 321 U.S. 144, 153, 154; 88 L. ed. 635, 642. The case cited was decided while World War II was in progress, but even the emergency conditions then existing were not considered sufficient to make it necessary to brush aside the public utility rate-making power of the State of California.

The Government apparently has solved, without too much difficulty, another problem arising out of the need for distinguishing between interstate and intrastate transportation. Although General Lasher first said that "it has not been necessary for us to distinguish between intrastate and interstate traffic up until a relatively short time ago", and that normally the Department of Defense is not concerned with the question of whether traffic is moving in interstate or intrastate commerce (R. 388, 389), on cross-examination it developed that the Department of Defense had prescribed the use of a form printed No-

vember 1, 1952, which requires all carriers desiring to do business with Department of Defense agencies to disclose in detail the nature and scope of their operating authority from both the Interstate Commerce Commission and state regulatory agencies (Exhibit A, R. 861). The regulations prescribing this form (32 CFR, 1956 Supp., Secs. 212.1 through 212.3, Appendix B, p. 25) state that it is to be used by the military departments in securing "certain essential information from motor common carriers." The importance of such information was further emphasized by the Government in the brief it filed on the Commission's motion to dismiss (R. 149). Obviously, it is necessary to know whether a contemplated move is in interstate or intrastate commerce in order to know whether or not an interested carrier has the proper operating authority, unless use is made of the Marine Corps' expedient of employing, where possible, in case of doubt carriers with both types of operating authority (R. 561).

It would seem from what has been said that the Government has been able to accommodate itself to state regulation of operating authority, and to find means of distinguishing between interstate and intrastate traffic in order to conform to such regulation, but its representatives profess to have difficulty in making such distinction for the purpose of ascertaining the applicable rate.

(5) The alleged difference between Government traffic and commercial traffic.

It was said that Government traffic is different from commercial traffic in that commercial traffic forms a pattern while the requirements of the military are dictated

"by forces outside of the United States"; that military traffic moves "opposite to the flow of commercial or industrial traffic"; and that the military ships "all of the materiel and machines of war." (R. 371).

Whatever may have been intended as the significance of these distinctions, the fact is that they are not valid, at least not in California, and they conflict with the Government's own evidence, already referred to, that the Navy's greatest volume of traffic is between the commercial and industrial areas of San Francisco-Oakland and Los Angeles (including Long Beach and San Pedro), and between San Francisco-Oakland and San Diego (R. 510); and that one of the biggest businesses at the Army's Sharpe General Depot is in canned goods or subsistence items (R. 432). It appears also that there is automatic requisitioning or issue of "consumables" (R. 399, 402, 466); that a large portion of the military installations to which shipments move from Sharpe General Depot are located on or near major highways (R. 466); and General Lasher, as well as other witnesses, made it clear that the military forces ship, in addition to the engines of war, quantities of "the usual things that move in commerce today—we ship shoe strings, toilet soap and eggs . . ." (R. 371, 881, 889).

Here again is an instance of the desirability of a comprehensive analysis and summary of Government traffic. Such a summary would show what percentage of all the property shipped by the Government is of the same character as property shipped by commercial enterprises, and what percentage is property of a character peculiar to military organizations.

(6) The implied prejudice to California from rate regulation.

General Lasher said that if state rate regulation became effective "we would probably have to rearrange our entire depot system." (R. 386). Other witnesses joined with him in saying that more traffic would be routed over interstate routes (R. 386, 473, 474, 489). Colonel Hall said that greater use would be made of the privilege of transit (R. 472).

It is not altogether clear what is the significance of these forebodings. Apparently, they were intended to suggest either that California interests would suffer if rate regulation became effective, or that the Government would incur added expense. But the Government does not seem to have attached much weight to them, and it does not seem necessary to say more, if the Government is concerned about California, than that the Legislature of California is probably the best judge of its interests.

(7) The alleged merit of the present system.

Several of the Government witnesses professed to find the present system of using special rates for Government traffic a good and efficient system (R. 422, 575, 587, 606).

They clung to this opinion even after conceding that there are abuses attending the present system, and in the face of conclusions reached by the Interstate Commerce Commission, the Presidential Advisory Committee on Transport Policy and Organization (the Weeks Committee), the Commission on Organization of the Executive Branch of the Government (the Hoover Commission) and the Subcommittee on Transportation of the Hoover Commission, that there are numerous abuses and inefficiencies

attending the present system (R. 422-429, 579, 580, 588-591, 606-612, 865-957).

General Lasher, although testifying as a representative of the Department of Defense, even felt constrained to disagree with his superior, Secretary of Defense Charles E. Wilson, who was a member of and subscriber to the unanimous report of the Weeks Committee (R. 426).

(8) The mere existence of any state power whatever is onerous.

Finally, two of the Government witnesses on cross-examination disclosed their most deep-seated motivation, which was an instinctive aversion to the mere existence of any state power whatever. Their statements are revealing. After expressing his belief that the Commission would be "most receptive" to representations that certain types of Government traffic should move at reduced rates, General Lasher then added "But the mere fact that we would have to make such representations is to me the crux of this." (R. 409). Again, upon being asked if his anxiety would be allayed if the Commission should, upon proper representations, authorize carriers to make rates effective retroactively, the General replied "Partially—not wholly, because the power would still flow to the Commission. The power would still flow to the Commission, in my opinion, and therefore still be a threat." (R. 412, 413). Colonel Hall was asked why, in view of the Commission's power under Section 530 to authorize transportation for the United States free or at reduced rates, he was so certain he would automatically be required to pay minimum or established rates if the District Court's restraining order were not in effect. His answer was "Well, perhaps I am just looking at the worst possible picture." (R. 454).

It has already been stated that the Government in numerous ways has made it clear that it considers the issue here to be national in scope, and to involve the question of the right of any state to regulate in any manner whatever the rates of carriers for the transportation of property of the United States (R. 150, 413).

A number of its witnesses, therefore, including General Lasher, admitted to having little or no familiarity with the conditions surrounding the transportation of Government property in California, and to have made no attempt to inform themselves before coming to California to testify (R. 387, 388, 393, 394, 492, 595, 596).

The Commission respectfully submits that these admissions, without more, are sufficient to seriously impair, if not wholly discredit, the testimony of these witnesses about the effect of Section 530 of the Public Utilities Code upon the interests of the United States.

The Commission has attempted, in the preceding pages, to set out and to evaluate all of the reasons expressed by the Government witnesses for their conclusion that California regulation of the rates of carriers for the transportation of property of the United States would hamper and injure the United States.

It is respectfully submitted that their reasons were wholly inadequate to support that conclusion.

The findings of fact of the District Court, being based upon such evidence, were "clearly erroneous", and therefore may be reversed by this Court. *U. S. v. U. S. Gypsum Co.* (1948), 333 U.S. 364, 395; 92 L. ed. 746, 766.

In order to show how little the transportation of Government property would be affected by the amendment to Section 530 of the Public Utilities Code it seems desirable to set out here an integrated description, based upon what is believed to be uncontroverted evidence of record, of the organization, methods and practices of those Government agencies, and of those commercial carriers, concerned with the transportation of Government property.

It appears that each branch of the Armed Forces maintains regional offices for the purpose of supplying to local shipping activities various traffic management services, including routing and rating (R. 915-920). These regional offices are equipped with staffs of skilled rate men, and with tariff libraries consisting of thousands of tariffs and special rate quotations (R. 396, 397, 405, 503, 578).

In practice, an important distinction is observed by Government transportation personnel between large volume and small volume moves. On small volume moves, i.e., less than carload (LCL), or less than truckload (LTL), or less than 10,000 pounds, local transportation officers are authorized to route the shipment without first consulting the regional office (R. 405, 940, 943, 945-947). For large volume moves, however, involving car load or truck-load quantities, local transportation officers are required to obtain route and rate information from a regional office (R. 405, 940, 943, 945-947).

There is another important distinction, observed in practice by Government transportation personnel, between those moves for which time is of the essence and those for which time is not an important factor (R. 400).

A method frequently used for making reduced rates available to the Government is that of various tariff publishing bureaus in preparing Government rate tenders after agreement among a number of carriers participating in the tariffs published by those bureaus, and in submitting such tenders by filing them with each of the military services in Washington (R. 626, 627). Such rate tenders are also made from time to time by the tariff publishing bureaus for the account of a single carrier, the practice being in such cases for the tariff publishing bureau to notify other carriers participating in that bureau's tariff publications (R. 627). Rate quotations prepared in these ways are printed in tariff form (R. 627).

Another method is for individual carriers to file special rate quotations with Government agencies without the medium of a tariff publishing bureau. Copies of some, but not all of such quotations, are sent by the military agencies to tariff agents and to other interested carriers (R. 632, 635, 636).

As a result of these practices, there are on file with Government agencies, at any given time, thousands of special rate quotations which have been made available to the Government *for substantial periods of time in advance of* movements that may later be governed by such quotations. When moves are contemplated, from time to time, for which no special rate quotation and no appropriate established rate is available, then the practice of the Government agencies is to negotiate with a carrier or group of carriers, or with a representative of carriers, for special rates for such moves (R. 377, 584). If time is of the essence, the move takes place and the rate is negotiated and agreed

upon afterwards (R. 406, 585, 597). Otherwise, negotiation and agreement precede the move (R. 406).

When Section 530 of the Public Utilities Code is considered in the light of the foregoing anaiysis of the evidence, certain conclusions are irresistible. A large area of Government traffic, namely, LCL-LTL, would not be affected *at all* by regulation, since it presently moves at established class rates.

Another large area, namely, traffic for which appropriate commodity rates are presently established and presently available to Government traffic, such as those on canned goods, petroleum, iron and steel goods, sugar and coffee, likewise would not be affected *at all* by regulation.

There is another area of Government traffic suitable for the application of commodity rates for which there may not now be established commodity rates, but for which such rates could quickly be authorized by the Commission without a public hearing. Such traffic would not be adversely affected by regulation provided the interested parties took the necessary steps to obtain Commission authority. Presumably, these steps would be taken by the tariff publishing bureaus on behalf of the carriers, and would not necessarily add much more time or effort to the filing with Government agencies of reduced rate quotations than at present. Presumably, also, such tenders would be prepared and Commission authority obtained where appropriate, and the tenders filed with Government agencies *in advance, as at present,* of moves that would be governed by such special rates.

Shipments for which time is of the essence and which must move before a suitable rate could be authorized,

would not be adversely affected if the Commission should exercise what appears to be a clearly granted power to make rates for Government traffic retroactive.

Shipments of classified materiel, or requiring the preservation of military security, which, for some reason in the opinion of responsible Federal officials, should move by vehicles under the control of commercial carriers, could be made the subject of a blanket exemption by the Commission, and thereby remain unaffected by regulation.

There remains only the traffic now moving at FAK rates. In view of the history of these rates in California, the Commission desires to refrain from any commitments as to what it would do about them in the event its hands are untied. It has already found, after extended public hearings, that serious evils surround the transportation of Government property in California. Additional evidence of such evils, adduced at the trial in the District Court, has been referred to, evils of so grave a nature as to cause the witness Loretz to say "I have never witnesse[d] any depression of rates or rate-cutting in the face of rising costs such as has prevailed on this Government traffic." (R. 652). There is extensive evidence that the use of FAK rates is a major evil (R. 422, 645, 646, 666, 667).

It will be recalled also that a number of the Government witnesses admitted that there are abuses attending the present method of procuring transportation of Government property, and that General Lasher said that they are hard to eradicate. One of the principal reasons why they are hard to eradicate is to be found in the policy of the General Accounting Office which, after stating that "the bargaining for rates or the playing off of one carrier

against another by Government procuring officials, where it is known to the Government negotiators that such procedure is destructive of the ability of the competing carriers to function, is not justified," continued by saying that "It is not understood, however, how administrative officials of the Government can assume to determine that rates voluntarily tendered by the carriers should be rejected because, in the opinion of Government personnel involved, the rates may not be sufficiently productive of profitable revenue"; that "it was and is the considered opinion of the General Accounting Office that *traffic managers of the Federal Government are not charged directly with responsibility for the enforcement of the national transportation policy* and that any attempt on their part to give it effect in procuring services at proper rates for the Government would result in uncertainty and confusion in the award of Government business, with understandable protest and objection from the carrier or carriers tendering rejected lower rates"; and concluded that "this Office will endeavor to see that payments made for services procured at reduced rates are audited *in conformity with the reduced rates tendered and accepted*" (R. 963, 964).

In view of the overwhelming evidence of the existence of serious abuses surrounding the procurement of transportation of Government property in California, and in view of the renunciation by the General Accounting Office of any responsibility of Government procurement officers for insuring reasonable earnings to carriers of such property, the Commission believes it owes a duty to the people of the State of California to carefully scrutinize the rates and practices of those carriers, and particularly FAK rates.

In the light of the foregoing, the Commission respectfully submits that the District Court erroneously found and ruled that the Government would suffer irreparable damage and be hampered, delayed and endangered in the exercise of its constitutional responsibilities by the application of Section 530 of the Public Utilities Code; that the District Court should not have granted either injunctive or declaratory relief; and that the judgment below should be reversed with instructions to dismiss the complaint.

III. THE DISTRICT COURT'S FINAL JUDGMENT ON THE ULTIMATE QUESTION WAS ERRONEOUS.

The Commission hopes and believes that the Court will not find it necessary to reach in this proceeding the ultimate question involved, namely, whether the amendment to Section 530 of the Public Utilities Code was a lawful exercise by the State of California of the police power reserved to the states by the Tenth Amendment of the Constitution of the United States.

If, however, the Court should be of the opinion that it should entertain and decide this ultimate question, on this record, then the Commission offers the following argument which it believes will persuade the Court that the enactment of the statute was a lawful exercise of the police power.

The Penn Dairies case.

A case of paramount importance in a consideration of the ultimate question involved in the present case is *Penn Dairies, Inc. v. Milk Control Commission* (1942) 318

U.S. 261, 87 L.ed. 748. In this case, a milk distributor sold milk in Pennsylvania to the United States Army at a price lower than that fixed as minimum by an agency authorized by the State of Pennsylvania to fix prices for milk sold within the state. The agency, therefore, denied a new license to the distributor. This denial was sustained by the courts of Pennsylvania, *in which the United States Government was allowed to intervene*. On appeal, this Court affirmed the judgment.

In the cited case, the Court discussed at length the matters to be considered and the principles to be applied to cases like the present one.

On pages 268-271 (L. ed. 753-754) it was said:

> "Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.
>
> "Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article 1, § 8, cl. 12, and with the support of the supremacy clause, Article 6, § 2, could declare state regulations like the present inapplicable to sales to the government. [citing cases] But there is no clause of the Constitution which purports, unaided by congressional enact-

ment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

"We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. [citing cases] But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, [citing cases] and *the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation.* [citing cases]

"Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 PA Super Ct 270, 271; 24 A (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v. G. A. F. Seelig, Inc.* 294 US 511, 79 L ed

1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, 314 US 1, 88 L ed 3, 62 S Ct 43, 140 ALR 615, supra; *or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A. R. Co. v. Lichtenberg*, 176 Md 383, 4 A(2d) 734 supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 US 94, 84 L ed 596, 60 S Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy v. Mitchell*, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the

Constitution which established the system, see *Graves v. New York*, 306 US 466, 483, 487, 83 L ed 927, 937, 59 S Ct 595, 120 ALR 1466.

"Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. * * * Our inquiry here, therefore must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy."

The Court then pointed out (p. 271; L. ed. p. 754) that in order to show such a conflict, the United States Government relied on certain acts of Congress requiring competitive bidding in the purchase of supplies for the Army. The Court then proceeds to examine these statutes and concludes (pp. 272-273; L. ed. p. 755) that:

"* * * while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, * * *"

The Court continues as follows (pp. 274, 275; L. ed. p. 756):

"Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. * * * "

On page 275 (L. ed. p. 756), the Court said:

"Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government, *For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.*"

The Court then refers to the United States Government's reliance upon a certain Army regulation in effect at the time of the sale in question containing certain instructions to contracting officers, and said (p. 276; L. ed. p. 757) that the statutes authorizing the Secretary of War

to prescribe rules and regulations for procurement "give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price."

The Court concludes its opinion as follows (p. 278; L. ed. p. 778):

> "We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk Control Law to appellant Penn Dairies, Inc., by denial of its license application."

This case describes two inquiries to be made in cases like the present, viz., (a) whether the state regulation in question is prohibited expressly or impliedly by any clause of the Constitution of the United States, and (b) whether such regulation conflicts with Congressional legislation or with any discernible Congressional policy.

A. There is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit the regulation by states of the rates of commercial carriers for the transportation of property of the United States; nor is any such prohibition to be implied from the relationship of the two Governments established by the Constitution.

This conclusion is required in the present case for the same reasons as those which obtained in the *Penn Dairies* Case. Even assuming that California's regulation of the rates of commercial carriers of property of the United States would impose an increased economic burden on the Government, that is not sufficient to bring such carriers within any implied immunity of the Government from state regulation.

The District Court was clearly wrong, therefore, in ruling that "The regulation of the rates for the shipment of military materiel intrastate by the several States would so drastically hamper and interfere with the officers of the United States in the discharge of their responsibility of supplying the defense establishments and related activities and would so endanger the security of the United States that State statutes conferring such power upon State regulatory bodies would be unconstitutional and void as contravening the provisions of the United States Constitution relating to the national defense *in the absence of any act of Congress.* Such State statutes would be valid only upon the condition that Congress enacted a statute expressly authorizing the various States to regulate such rates." (Ruling VII; R. 254).

B. The amendment of Section 530 of the Public Utilities Code does not conflict with Congressional legislation or with any discernible Congressional policy.

The District Court ruled that "By section 22 of the Interstate Commerce Act, 24 Stat. 387, the Armed Services Procurement Act, 41 U.S.C. section 151(c), the Federal Property Administrative Services Act of 1949, Public Law 1952, 81st Cong., 1st sess., sections 201 and 202, 63 Stat. at page 377, Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by Commissions and other bodies vested with the power of regulating the rates for the transportation of property generally." (Ruling VI; R. 254).

(1) Section 22 of the Interstate Commerce Act (24 Stat. 387; 49 U.S.C. Section 22).

Section 22 of the Interstate Commerce Act was recently amended by Public Law 85-246, 85th Congress, S. 939 (71 Stat. 564), approved August 31, 1957, by adding paragraph (2). As thus amended, Section 22 is set out on pages 10, 11 of Appendix B hereto.

There is nothing whatever in this section of the Interstate Commerce Act, nor in that Act as a whole, reflecting any policy of Congress to exempt the *intrastate* transportation of property of the United States from regulation by the states. Section 22 is a part of Chapter 1 of the Interstate Commerce Act and is subject to the provisions of Section 1 (2)(a) of that Act which, in pertinent part, states:

"(2) *Transportation Subject to Regulation.* The provisions of this Chapter . . . shall not apply—

(a) to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state . . . "

Whatever may have been the intention of Congress in 1887 in enacting the original Section 22 of the Interstate Commerce Act, the transportation of property of the United States free or at reduced rates was once required of land-grant railroads in order to compensate the Government for its grant of lands over which certain railroads were constructed. Later, the privilege of Section 22 was exercised by other railroads which had received no land grants but which desired to compete for Government business on even terms with the land-grant railroads. See *Southern Railway Co. v. U. S.* (1943), 322 U.S. 72; 88 L. ed. 1144. Subsequently, the privilege of Section 22 was extended to motor vehicle carriers subject to the jurisdiction of the Interstate Commerce Commission under the provisions of the Federal Motor Carrier Act (Part II of the Interstate Commerce Act; 49 Stat. 543; 49 U.S.C., Section 317(b)). The latter Act, however, contains this provision: "Nothing in this chapter shall be construed . . . to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof." (49 Stat. 543; 49 U.S.C. 302(b)).

Moreover, the provisions of Section 22 impose no duty upon carriers, but are permissive only. *Nashville, Chattanooga & St. Louis Ry. v. State of Tennessee* (1923) 262 U.S. 318; 67 L. ed. 999.

In 1940, Congress, in repealing land-grant rates, i.e., those rates that the United States had enjoyed by virtue of the requirement imposed by prior law that land-grant railroads assess reduced rates for the transportation of persons and property for the United States, adopted the Act of September 18, 1940 (54 Stat. 954; 49 U.S.C. Section 65; Appendix B, p. 9), the material portions of which are as follows:

> "(a) Notwithstanding any other provision of law, but subject to the provisions of Sections 1(7) and 22 of this title, the full *applicable* commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to chapters 1, 8, 12, and 13 of this title of any persons or property for the United States, or on its behalf, . . .
>
> • • •
>
> "*Provided further,* That section 5 of Title 41, shall not after September 18, 1940, be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any *common carrier lawfully operating in the territory where such services are to be performed.*"

This statute imposes *upon the United States* an obligation to pay "the full applicable commercial rates" for transportation of its property, with the exceptions noted; and the proviso exempts procurement officers from the advertising requirement of 41 U.S.C. Sec. 5 (Appendix B, p. 11) with a clearly manifested recognition of local rate regulation as a substitute for competitive bidding.

The recent amendment to Section 22 was the culmination of wide spread dissatisfaction on the part of car-

riers and shippers with the reduced rates enjoyed by the Government. The 84th Congress had before it the so-called Hinshaw Bill (H.R. 525) which would have repealed outright the privilege of carriers to transport property of the United States free or at reduced rates. This bill was the subject of extensive hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives. (See report of hearings September 19, 20, 21, 22, 1955, of the First Session, and April 24, 25, 26, May 2, 3, 4, 8, 9, 10, 11, 22, 23, 24, 29, June 5, 6, 8, 12, 13, 14, 20, 1956, of the Second Session). Although this bill was approved by the House Committee on Interstate and Foreign Commerce, it was not enacted into law, and died with adjournment of the 84th Congress. The matter of reduced rates under Section 22 was brought up again, however, before the 85th Congress, and the amendment referred to was the result.

Although this amendment does not go so far as to repeal the right of carriers to transport property of the United States free or at reduced rates, it regulates and imposes conditions upon such right by requiring that reduced rate tenders or quotations be in writing and filed with the Interstate Commerce Commission. It clearly reflects a recognition by Congress of some of the evils that attended the unregulated and unqualified right formerly enjoyed, and represents at least a partial attempt to correct those evils, *to the extent that interstate commerce is involved.*

It is very important to realize that if the judgment below stands, California would be unable to take even this amount of corrective action in behalf of *intrastate*

commerce, *and there would result the anomaly that Congress had taken remedial action in the field of interstate commerce while California and other states were rendered powerless to correct the same kind of evils and abuses in intrastate commerce.*

It seems clear that there is nothing whatever in Section 22 of the Interstate Commerce Act, either before or after its recent amendment, disclosing any intention of Congress to interfere with state regulation of intrastate commerce. *Hughes Transp. v. United States* (1954) U.S. Ct. of Cl. 121 F. Sup. 212, 232.

Since *Penn Dairies* was decided, the law governing procurement of services and supplies by Governmental agencies has been amended by Congress, and it becomes necessary, therefore, to determine whether or not there is anything in the new law requiring a different result from that reached in *Penn Dairies*.

(2) The Armed Services Procurement Act of 1947 (62 Stat. 21).

This Act was formerly codified as Sections 151-161 of Title 41 of the U. S. Code. However, these sections were repealed by the Act of August 10, 1956 (Public Law 1028, of the 84th Congress, 2d Session, ch. 1041; 70A Stat. 641-677). The latter Act is entitled "An Act to Revise, Codify, and Enact into Law Title 10 of the United States Code, entitled 'Armed Forces', and Title 32 of the United States Code, entitled 'National Guard' ".

The legislative history of this Act is set out in U. S. Code Congressional and Administrative News, 84th Congress, 2d Session 1956, Volume 3, pages 4613-4651. This history makes it plain that Congress did not intend by

the Act of August 10, 1956, to effect any change in substantive law, but only to restate existing law (see pages 4620, 4621, 4631, 4635, 4640, 4641, 4651).

Procurement of property and services for the Armed Forces is now governed by Sections 2301-2314 of Title 10 of the U. S. Code, the pertinent provisions of which are set out in Appendix B hereto (pages 4-7). There is nothing whatever in said sections suggesting any policy of Congress inimical to state regulation of the rates of carriers for the transportation of property of the United States.

Since the Act of August 10, 1956 was not intended to change the substance of any law restated therein, it seems appropriate to examine the legislative history of the Armed Services Procurement Act of 1947 for any evidence of Congressional policy with respect to state rate regulation. This history, Senate Report No. 571, is set out in U. S. Code Congressional Service, 80th Congress, 2d Session 1948, Volume 2, pages 1048-1078. This report states (pages 1048-1049) that the "Purpose of the bill" is, in part, as follows:

> "This bill, as amended, provides for a return to normal purchasing procedures through the advertising-bid method on the part of the armed services, namely, the War Department, the Navy Department, and the United States Coast Guard. It capitalizes on the lessons learned during wartime purchasing and provides authority, in certain specific and limited categories, for the negotiation of contracts without advertising. It restates the rules governing advertising and making awards as well as fixing the types of contract that can be made. * * *

"This bill, as amended, makes uniform all the laws and rules covering purchase procedures for the armed services and repeals many obsolete and diverse laws. It contemplates that the regulations issued under this act by the respective departments shall be as uniform as practicable and that the procedures established thereby will expedite the development of cross procurement and combined purchasing.

"A quote from the House report presents their concept of the bill and applies equally to the bill as amended. The quotation is as follows:

"'* * * The bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the Government of fair and reasonable prices for the supplies and services procured, and affords an equal opportunity to all suppliers to compete for and share in the Government's business. * * *'

"To this should be added that it places the Government's contracting officers in a position to secure better prices and products through broadened authority in certain specified instances. Both as it passed the House of Representatives and as reported to the Senate this bill has the approval of the General Accounting Office."

There is nothing in this language antagonistic to state rate regulation. On the contrary, there are indications elsewhere in the Senate Report that local regulation was

expressly contemplated. Thus, on page 1055, in analyzing a portion of the bill containing an exception to the requirement for advertising (now 10 U.S.C. Section 2304 (10)), where the contemplated procurement is "for property or services for which it is impracticable to obtain competition", reference is made to certain fields "*where prices are set by law or regulation.*" Again, on page 1062, in analyzing another section of the bill (now 10 U.S.C., Section 2304 (17)), dispensing with the requirements of advertising where "negotiation of the purchase or contract is otherwise authorized by law", reference is made to the Act of September 18, 1940 (54 Stat. 954; 49 U.S.C., Sec. 65; App. B, pp. 9, 10), referred to above, which authorizes the procurement of transportation services without advertising when the services required can be procured from any "common carrier lawfully operating in the territory where such services are to be performed."

(3) Regulations promulgated by Department of Defense.

The regulations promulgated by the direction of the Secretary of Defense under the authority of the Armed Services Procurement Act of 1947 and subsequent statutory authority, establishing for the Department of Defense uniform policies and procedures for the procurement of supplies and services, are contained in 32 CFR, 1956 Supp., Subchapter A, Section 1.100 through Section 30.4, the material parts of which are set out in Appendix B hereto (pp. 18-25).

In these regulations there is clearly discernible a policy of *recognition and acceptance* of local regulation of rates

for transportation services. Thus, in implementing Section 2(c)(10) of the Armed Services Procurement Act of 1947 (now 10 U.S.C. Sec. 2304 (a)(10) exempting procurement officers from the requirement of competitive bidding in procuring "supplies or services for which it is impracticable to secure competition", Section 3.210-2(j) gives, as illustrative of circumstances justifying this exemption, procurement for certain transportation services "when ... the rates are established *by law or regulation*." *Penn Dairies v. Milk Control Commission* (1943), 318 U.S. 261, 277; 87 L. ed. 748, 757, 758.

Again, Section 3.210-2(k) states that negotiation for commercial transportation by common carriers is authorized by Sections 3.217 to 3.217-2 and by 49 U.S.C. Section 65. Said Sections 3.217 and 3.217-2 implement 10 U.S.C. Section 2304(a)(17) authorizing negotiation when it is "otherwise authorized by law." 49 U.S.C. Section 65 (Appendix B, pp. 9, 10) is such a law. It has already been referred to above in connection with the discussion of Section 22 of the Interstate Commerce Act and of the legislative history of the Armed Services Procurement Act of 1947. It authorizes procurement of transportation services without advertising when they can be procured from any "common carrier lawfully operating in the territory where said services are to be performed."

Again, Section 1.306-9 (promulgated, it is interesting to note, on September 6, 1956, three months after the date of the judgment of the District Court) recites that "Generally, carriers are *required* by both Federal *and State laws* to charge all shippers equally for like services rendered. However, *when* government traffic possesses more

favorable transportation characteristics . . . than commercial traffic between the same origins and destinations, freight rates are often lower for the government traffic."

In order to control the negotiated procurement of public utility services other than transportation, the Department of Defense has prescribed the use of certain forms referred to in 32 CFR, 1956 Supp., 16.501 through 16.501-2 (Appendix B, pages 23-25). Section 16.501-1 provides that such utility services shall be procured without a written contract "*when the supplier's rates are regulated by a Federal, State, or other public regulatory body* and when the annual cost of the services to be procured is estimated . . . to be $2400 or less. * * * Deviations from the provisions of the form are authorized when necessary in order to *comply with State or local laws and regulations.*"

These regulations of the Department of Defense reflect a much greater tolerance of state regulation of rates and prices than did the regulations of the War Department that were in effect at the time of the sale of milk that gave rise to the *Penn Dairies* case, and that were referred to by Mr. Justice Douglas in his dissenting opinion in that case at 318 U.S. 261, 283, 284; 87 L. ed. 748, 760, 761.

In view of these plain indications of a policy of recognition and acceptance, by Congress and by the civilian head of the Department of Defense, of state regulation of transportation rates, as well as rates for other kinds of public utility services, it is very difficult to understand how the District Court reached the conclusion that Congress has expressed by the Armed Services Procurement Act "a general policy that the procurement of transportation serv-

ices for the shipment of government property be by contract and special arrangements and not subject to regulation by commissions and other bodies vested with the power of regulating the rates for the transportation of property generally." (R. 254) Nor does the opinion of the District Court throw much light upon how it reached this conclusion. It contains not a single word about the Armed Services Procurement Act of 1947 nor about Department of Defense regulations promulgated thereunder.

It would seem that the District Court made no attempt to analyze the statute or the regulations reflecting the policy of the *civilian* authorities of the Federal Government, but heeded only the highly charged emotional appeal of certain military officers who frightened the District Court into believing that local civilian regulation of transportation rates would jeopardize the Nation's safety. The sharp contrast between the views of the civilian and military authorities, which was exemplified by General Lasher in his openly expressed disagreement with the views of his civilian superior, Secretary of Defense Charles E. Wilson (R. 426), reveals the deep-seated disagreement that appears to exist between the civilian and military authorities of the Federal Government, a disagreement that was referred to by counsel for the Government at the trial as a "dynamic struggle" (R. 424, 894).

In a democracy, however, military officers are soldiers, not statesmen; their duty is not to dispute but to accept and to carry out the policies formulated by their civilian superiors. It could hardly be presumed that men trained in the military arts would qualify as authorities on the vital constitutional issue here presented.

(4) The Federal Property and Administrative Services Act of 1949 (63 Stat. 378, et seq.).

The Federal Property and Administrative Services Act of 1949 (63 Stat. 378, et seq.) has been codified in 5 U.S.C. Sec. 630; 40 U.S.C. Secs. 471, 472, 474, 481, 486; 41 U.S.C. Sec. 5, 251-260; and 44 U.S.C. Sec. 391. Material portions of this statute are set out on pages 12-18 of Appendix B hereto.

The history of this statute is set out in U.S. Code Congressional Service, 81st Congress, 1st Session, 1949, Volume 2, pages 1475-1511. On pages 1479-1480 it is stated: "... the bill provides a central system relating to traffic management, transportation, and other public utility services for the use of executive agencies * * * Title III [procurement procedure] extends to the General Services Agency the principles of the Armed Services Procurement Act of 1947, with appropriate modifications principally designed to eliminate provisions applicable primarily to the military. * * * This title provides for the modernization of procurement methods and procedures. It clarifies and preserves the formal advertising method of procurement, but at the same time, under proper control, authorizes negotiation in certain classes of cases * * * The Committee believes that Title III is substantially in accord with the recommendation made by the Commission on Organization of the Executive Branch of the Government in its Report on the Organization and Management of Federal Supply Activities, that legislation be enacted to apply the principles of the Armed Services Procuremept Act of 1947 to buying by all agencies, * * *"

On page 1485 it is stated: "The Administrator . . . may for the use of executive agencies represent such agencies

in negotiations with carriers and other public utilities, and in *proceedings before regulatory bodies involving carriers and other public utilities.*"

On page 1495, referring again to Title III, Procurement Procedure, it is stated: "This title follows in structure, and is identical in language with, the Armed Services Procurement Act, with a few appropriate changes and omissions."

On page 1496 in referring to Section 302(c) (41 U.S.C. 252(c)), it is stated: "Initially, this subsection reaffirms the basic principles that purchases and contracts shall be made by advertising. Negotiation is made permissible in certain excepted cases, however, to provide flexibility in Government procurement." In referring to Section 302(c)(1) (41 U.S.C. 252(c)(1)), it is said: "This paragraph would permit automatic and immediate transition from more rigid peacetime advertising procedures to a completely flexible system if the President or the Congress declares the existence of a national emergency." In referring to Section 302(c)(9) (41 U.S.C. 252(c)(9)), it is said: "This paragraph provides for negotiation where it is impracticable to secure competition and places upon the agency concerned the maximum responsibility for decisions as to when it is impracticable. It is intended that this paragraph should be construed liberally."

In that section of the Act where Congress declares its policy, viz., 40 U.S.C. Section 471, it is stated that "It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related func-

tions such as . . . transportation and traffic management, . . . management of public utility services . . . and *representation before Federal and State regulatory bodies . . .*"

Nothing could be plainer in showing Congress's recognition and acceptance of state regulatory authority over various kinds of transactions in which Government procurement officers may be interested.

This policy is also reflected in 40 U.S.C. Section 481 wherein the General Services Administrator "to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service . . .", is empowered to prescribe policies and methods of procurement of property and services, including transportation and traffic management, and management of public utility services, and, "with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities *before Federal and State regulatory bodies . . .*" A proviso, however, permits the Secretary of Defense to exempt, unless the President shall otherwise direct, the Department of Defense from action by the General Services Administrator "whenever he determines such exemption to be in the best interests of national security."

In referring to this proviso, the legislative history above referred to states (p. 1486):

> "Combat equipment and other items of peculiar importance to the armed forces could thus readily be excluded by the Secretary of Defense. At the same time, the Administrator would be in a better position

to serve the armed forces more fully in meeting their other supply requirements, and he can appeal to the President if he thinks the Secretary of Defense has wrongly excluded him from any field."

On October 2, 1954, the Secretary of Defense gave notice that he had elected to exercise this right. This notice was published in 19 Federal Register, p. 6611, and is set out on pages 28, 29 of Appendix B hereto. In this notice the Secretary of Defense announces his decision to exempt the Department of Defense from action taken by the Administrator of General Services in "(a) the prescription of policies and methods of procurement and supply of transportation and traffic management, (b) the performance of functions related to procurement and supply of transportation and traffic management, and (c) *the representation* in negotiations with carriers and *in proceedings involving carriers before Federal and State regulatory bodies* in transportation and traffic management."

This decision means that the Secretary of Defense has decided to retain independence of action in the matters referred to, on behalf of the Armed Forces. It has already been shown above, however, that the Secretary of Defense has taken no action inimical to state regulation of rates for the transportation of property for agencies within the Department of Defense, but, on the contrary, has promulgated regulations that recognize and accept such regulation.

In the provisions pertaining to procurement, the Federal Property and Administrative Services Act of 1949 reflects the intention of its framers to model it upon the Armed Services Procurement Act of 1947. Thus, 41 U.S.C. Section

252(c), permitting the General Services Administration to negotiate for property and services without advertising in certain cases, specifies many of the same grounds for such exemption as those contained in 10 U.S.C. 2304 (Appendix B, p. 5), and, like the latter Act, is wholly consistent with State regulation of rates for the transportation of property of the General Services Administration.

(5) Regulations promulgated by the General Services Administration.

The regulations of the General Services Administration governing procurement of transportation and public utility services are set out in 44 CFR, 1956 Supp., Sections 53.6(a)-(d), 53.21, and 54.25, appearing on pages 26-28 of Appendix B hereto.

Nothing has been found in any of these regulations disclosing any policy of the General Services Administration that procurement of transportation or other public utility services by it is to be free of regulation by the States. It appears on the contrary that such regulation, at least of public utility telephone service, is expressly contemplated in Section 54.25 prescribing a form of contract for telephone service which states that "This contract is subject to all rates, charges, rules, practices . . . or requirements which may be *lawfully established*"; and under "Instructions", this form provides that "if charges are approved or ordered by *any legally constituted authority having jurisdiction*, or otherwise *lawfully established* by the contractor, which affect the charges for exchange service, or any of the terms of an existing contract or of these instructions, subscriber [i.e., General Services Administration] shall be notified thereof. . . ."

In practice, the Administrator of General Services and the Secretary of Defense have given further tangible evidence that they consider procurement for the United States as subject to State regulation by frequently appearing before State regulatory bodies in rate making proceedings. As noted earlier in this brief (supra, p. 16), the appearance of "Clement T. Mayo, Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the United States Government" was entered in the proceeding before the Commission that gave rise to the complaint in the present case.

Notices of such appearances of various Federal Agencies before other regulatory bodies are frequently published in the Federal Register. For example, on May 12, 1955 (20 Federal Register page 3240) notices of such appearances before the Arkansas Public Service Commission and the Georgia Public Service Commission were published. Another such notice was published on August 29, 1956 (21 Federal Register 6730) containing a delegation of authority by the General Services Administrator to the Secretary of Defense to appear before the California Commission in a proceeding involving an application by the California Electric Power Company for authority to increase its electric rates.

These appearances make it clear that the Department of Defense and the General Services Administration long ago established the necessary organization, personnel, and procedures to protect the interests of the United States before State rate-making bodies. Section 530 of the Public

Utilities Code, therefore, does not impose any burden upon the United States that had not already been assumed.

One of the very significant things to be observed in the statutes enacted by Congress is the ample provision it has made for national emergencies. In the Armed Services Procurement Act (10 U.S.C. Sec. 2304(a)(1); Appendix B, p. 5) authority is granted to procurement officers to negotiate for property or services if "it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President." A similar provision appears in the Federal Property and Administrative Services Act (41 U.S.C. Sec. 252(c)(1); Appendix B, pp. 15-16). Moreover, in the Armed Services Procurement Act (10 U.S.C. Sec. 9742; Appendix B, p. 7), Congress has provided that "In time of war, the President, through the Secretary of the Air Force, may take possession and assume control of all or part of any system of transportation to transport troops, war material, and equipment, or for other purposes related to the emergency. So far as necessary, he may use the system to the exclusion of other traffic."[20] With these precautions having been taken by Congress in clear anticipation of real national emergencies, there is no reason for the District Court to have decided the present case under the illusion of a continuing emergency conjured up by the military authorities in order to paralyze the exercise by the States of their rights under the Tenth Amendment.

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[20]10 U.S.C. Sec. 4742 is identical with the quoted Section 9742 except that the Secretary of the Army appears in the former in place of the Secretary of the Air Force.

The Commission finds it incomprehensible that the District Court ruled that in the Federal Property and Administrative Services Act of 1949 "Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be by contract and special arrangements and not subject to regulation by commissions and other bodies vested with the power of regulating the rates for the transportation of property generally." (R. 254) In the District Court's opinion, there is only a single casual reference to this Act (R. 203) and none whatever to the regulations promulgated by the General Services Administration under it.

The conclusion is inescapable that the District Court made no attempt to analyze any of the statutes or administrative regulations pertaining to the procurement of transportation and other public utility services for any of the agencies of the Federal Government.

In the light of the foregoing examination of the statutes and regulations, the District Court was clearly wrong in its ruling with respect to the policy of Congress.

This concludes the Commission's analysis of those matters which the *Penn Dairies* case defined as the proper subjects of inquiry in cases like the present. In the light of that analysis, the Commission respectfully submits that nothing has been done, with respect to procurement, either by Congress or by any administrative agency, since *Penn Dairies* was decided, showing any intention to abrogate the police power of the States for the sake of relieving the Armed Forces or any other agency of the Federal

Government from the effects of State regulation of the rates of carriers or other suppliers of public utility services.

On the contrary, the statutes enacted by Congress and the administrative regulations promulgated thereunder since *Penn Dairies* indicate that they were adopted in plain recognition of the principles of that case and of the result reached therein.

Nor have any other events occurred that make it necessary or desirable to depart from *Penn Dairies*. Subsequent history rather has proven the fundamental validity of that decision. It is now generally recognized that the United States must continue to maintain, for an indefinite period of time, a large military establishment in order to preserve the nation's security. But it does not follow that we must prejudice or compromise our fundamental political rights, nor is it necessary that the civilian officials of our Government abdicate their authority in deference to the military.

Congress may still be entrusted to take whatever further measures may be necessary to suspend those rights when the time comes, if it should ever come.

In the meantime, this immense military establishment, having become a user of transportation and other public utility services on a vast scale, should not be subsidized by other users of such services. These other users include all segments of society, large and small, individual and corporate, commercial and philanthropic.

In *Penn Dairies* and also in *Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 88 L. ed. 635, this Court

demonstrated, even during the extreme emergency of World War II, that it could not be stampeded into an abrogation of the rights of the States for the sake of military expediency. There is far less urgency now with conditions of peace prevailing.

The District Court's distinguishing of *Penn Dairies* from the present case on the ground that "There is a constitutional difference between a can of milk and a hydrogen bomb!" was superficial to say the least, and loses all meaning when it is remembered that the District Court's sweeping injunction *prohibits the Commission from regulating rates for the transportation of milk or any other commodity for the Government, as well as bombs.*

The other ground of distinction advanced by the District Court was that the Pennsylvania regulation imposed "no prohibition on the National Government or its officers", and that such officers might "purchase milk from whom and at what price they wished, without incurring any penalty." (R. 235), whereas Section 2112 of the Public Utilities Code provides "penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act." (R. 235).

This ground, however, loses its weight in the light of the fact that the complaint makes no reference whatever to this section of the Public Utilities Code, nor to any act or threatened act under it, nor did it name as defendant any law enforcement officer charged under California law with the duty of enforcing Section 2112. The only reference in the complaint to penalties is a general one, without reference to any specific section of the Public Utilities Code, to "penalties *upon common carriers.*" (R. 7)

If there is any genuine anxiety that Section 2112 of the Public Utilities Code might subject officers of the Federal Government to penalties for aiding and abetting carriers in violating Section 530 of the Public Utilities Code or Commission regulations thereunder, an anxiety apparently not felt by the Government when it filed its complaint, then the applicability and effect of Section 2112 should be decided either in a proceeding in which it has been invoked, or at least as a question presenting different considerations from the question of the applicability of penalties to carriers. There is no reason for nullifying, in this proceeding, the applicability of Section 530 *to carriers* simply because another California law might be construed to impose penalties upon officers of the United States. The two questions are clearly severable.

Section 21 of the Public Utilities Code states: "If any provision of this code, or the application thereof to any person or circumstance, is held invalid, the remainder of the code, or the application of such provision to other persons or circumstances, shall not be affected thereby." *Watson v. Buck* (1941) 313 U.S. 387, 397; 85 L. ed. 1416, 1421, 1422.

There is nothing in *Leslie Miller, Inc. v. Arkansas* (1956) 352 U.S. .....; 1 L. ed. 231, that is at variance with *Penn Dairies*. In the *Miller* case, there was a patent conflict between the regulations of the Federal Government, as contained in the Armed Services Procurement Act, laying down certain qualifications for contractors performing construction work for the Federal Government, and different qualifications contained in an Arkansas law governing the licensing of such contractors. In effect,

Federal law said to Miller, "You may perform construction work for the Federal Government"; while Arkansas said in effect "You may not." Of course, the State law must yield in such a set of circumstances.

A case presenting a similar question, and one decided the same way, is *Hill v. Florida* (1945) 325 U.S. 538; 89 L. ed. 1782. This decision nullified a Florida law imposing qualifications and requiring licenses for labor union organizers, and imposing upon unions certain requirements compliance with which was a condition precedent to their right to function. The reason for the decision was that such law conflicted with the policy of the National Labor Relations Act granting to labor the right to freely choose its own representatives.

In both these cases the State law conflicted with a clearly expressed policy of Congress.

Another kind of State law was nullified in *Johnson v. Maryland* (1920) 254 U.S. 251; 65 L. ed. 126, [relied upon by the Government here], where a postal employee was arrested and convicted in Maryland for driving without a license from the State. In that case, the Court, through the late Mr. Justice Holmes, said (pp. 55-57, L. ed. 128, 129): "Here the question is whether the state can *interrupt the acts of the general government itself* • • • [the State's] requirement does not merely touch the government servants remotely by a general rule of conduct; it *lays hold of them* in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient."

In the present case, the amendment to Section 530 of the Public Utilities Code does not prohibit carriers from per-

forming services the Government wants performed. It says "The Commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable * * * ." This statute does not empower the Commission to withdraw or interfere with the right, nay the *duty,* of *common* carriers, to transport, that is, to perform a service the United States wants performed, but says, in effect, when considered with Section 494 (Appendix B, p. 31), that carriers, after performing such service, shall charge the same rate as that charged to other shippers, unless the Commission authorizes a lesser charge.[21] Thus it is seen that the California statute in question does not "interrupt the acts of the general government itself", nor does it "lay hold of" Government servants attempting to obey orders. Nor has the Government argued that it does. Rather it professes to be aggrieved by the incidental effect upon it that would result from a law that impinges directly upon carriers with whom it has contracted for the transportation of its property.

This Court has decided, however, in a number of cases, in addition to *Penn Dairies,* that State laws that impinge directly upon persons contracting with the Government are not to be nullified merely because they incidentally affect the Government. Thus, the State law was sustained in *Alward v. Johnson* (1931) 282 U.S. 509; 75 L. ed. 496,

[21] If there is any doubt that this is the proper interpretation of the statute then, as suggested in an earlier part of this brief (supra, pp. 57, 58), the Supreme Court of California should be given an opportunity to interpret it authoritatively.

involving a gross receipts tax upon an independent contractor carrying the mails; in *James v. Dravo Contracting Co.* (1937) 302 U.S. 134, 149-161; 82 L. ed. 155, 166-173, involving a gross receipts tax upon one who had contracted to build a dam for the Government, and in which the earlier authorities were comprehensively reviewed; in *Baltimore & A.R. Co. v. Lichtenberg* (1939) 176 Md. 383, 4 Atl. 2d 734; appeal dismissed, 308 U.S. 525, 526; 84 L. ed. 444, involving safety regulations affecting the operations of a trucking company in performing its contract with the Government to transport workers employed on a Public Works Administration project; in *James Stewart & Co. v. Sadrakula* (1940) 309 U.S. 94, 84 L. ed. 596, involving the applicability of a State statute requiring building contractors to board over all open steel tiers for the protection of employees, to one who had contracted to build a post office for the Government on land ceded to it; and in *State of Alabama v. King & Boozer* (1941) 314 U.S. 1; 86 L. ed. 3, in which the question was whether a sales tax chargeable to the seller but to be collected from the buyer could be assessed against a lumber dealer from whom a building contractor had ordered lumber for use in building an army camp he had agreed to construct for the United States under a contract construed to impose upon him the obligation to pay the purchase price of necessary materials.

The last cited case was distinguished in *Kern-Limerick, Inc. v. Scurlock* (1954) 347 U.S. 110; 98 L. ed. 546, in which an Arkansas gross receipts tax was held inapplicable to a sale of tractors purchased by persons who had contracted with the Navy, under the Armed Services

Procurement Act, for the construction of an ammunition dump under terms authorizing the purchase by the contractors of equipment to be used in the construction, and providing that with regard to such transactions the United States should be the purchaser.

In this case the majority of the Court expressly rested its decision upon the ground that ". . . it is clear that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction * * * We find that the purchaser under this contract was the United States. Thus, King & Boozer is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States." (347 U.S. 121, 122; 98 L. ed. 556) The tax was held to be prohibited as one "levied on the property or purchases of the Government itself." (p. 123, L. ed. 557)

It has already been shown that Section 530 of the Public Utilities Code, coupled with Section 494, impinges directly upon carriers by requiring them to charge their tariff rates for the transportation of Government property, unless otherwise authorized by the Commission, and only indirectly affects the United States. The effect of the statute upon the United States has been discussed in a preceding part of this brief (supra, pp. 119-123) where the evidence adduced at the trial was analyzed. That analysis showed that the only possibly injurious incidental effect of Section 530, as amended, upon the United States was that of increased cost for transportation services furnished by commercial carriers.

Even assuming that such costs would be substantially increased by State regulation, that is not sufficient ground for nullifying such regulation, as stated in *Penn Dairies, Inc. v. Milk Control Commission* (1943) 318 U.S. 261, 269; 87 L. ed. 748, 753. But there is good reason to believe, as the analysis of the testimony of the Commission's witnesses shows (supra, pp. 93, 95, 96), that there would be no sharp increase in such costs, and that even the incidental effect upon the United States of State rate regulation of carriers would be negligible.

(6) Federal enclaves.

In its argument to the District Court upon the Commission's motion to dismiss, the Government cited certain cases that decided that commerce between a territory and a State and between the District of Columbia and a State is interstate commerce (R. 177). It then cited the case of *Pacific Coast Dairy, Inc. v. Department of Agriculture* (1942) 19 Cal. 2d 818; 123 Pacific 2d 442, 447 (reversed on other grounds, in 318 U.S. 285; 87 L. ed. 761) for the proposition that commerce between states and such military installations as Moffett Field, which is under the exclusive jurisdiction of the United States, is interstate commerce (R. 178). It then argued that "a number of the installations in the State of California, particularly the older ones, are situated on land which has been ceded to the United States and are held under its exclusive jurisdiction", and conjectured that shipments "might" move from one such installation to another (R. 179). The conclusion was that "the carriers and the contracting officers would have no firm basis on which to carry out their ne-

gotiations and arrangements without constant advice from lawyers in an esoteric field of the law. The confusion and uncertainty would be great indeed." (R. 179)

At the trial the Government offered in evidence a number of documents purporting to show the acquisition by the Federal Government of exclusive jurisdiction over a number of (but far from all) military installations in California (R. 778-860).

The problem and the confusion arising out of the status of such installations and shipments between them was again adverted to by the Government at the conclusion of the trial as an argument for nullifying State rate regulation (R. 713).

There are many things wrong with this argument. In the first place, there is no evidence in this record of any shipment between one installation under the exclusive jurisdiction of the United States and another such installation. Such shipments are purely conjectural. It follows, of course, that there is no evidence as to what percentage of the total Government intrastate traffic in California is between such installations. As already suggested in an earlier part of the brief (supra, p. 52) if a decision exempting Government shipments from State rate regulation is to be predicated upon the fact that such shipments move from one Federal enclave to another, such a decision should be made only in a proceeding involving a shipment or shipments that have actually so moved.

The case of *Pacific Coast Dairy, Inc. v. Department of Agriculture* (1943) 318 U.S. 285; 87 L. ed. 761, referred to above, does not help the Government here, for

the reason that all of the elements of the transaction that was the object of California's asserted power in that case, namely, an actual sale and delivery of milk at a price less than that fixed by California as minimum, took place upon ground that was under the exclusive jurisdiction of the United States, and the effect of the case is limited to a nullification of a specific exercise of State power over a specific transaction. In the present case, however, the object of California's asserted power is a continuing series of transactions involving the transportation of various kinds of property of the United States between various pairs of termini, many of which have not been proved to be under the exclusive jurisdiction of the United States, *and a very large part of these transactions takes place over the public highways of the State of California, outside Federal jurisdiction.*

Thirdly, the position of the Government with respect to Federal enclaves requires that it differ sharply from the conclusion reached in *Hughes Transportation, Inc. v. United States* (1954) 121 Fed. Supp. 212, in which the United States Court of Claims, in a comprehensive and scholarly opinion, decided that the transportation of ammunition by a commercial carrier for the United States Government between two Federal enclaves in the State of Kentucky, but with the intervening transportation taking place over the public highways of Kentucky, was not interstate commerce, and was subject to rate regulation by Kentucky.

Finally, it seems to the Commission that the alleged confusion arising from the premises described and relied upon by the Government as a reason for exempting

transportation between Federal enclaves in the same State from State rate regulation, argues in favor of the conclusion reached in the *Hughes* case, namely, that such transportation, when it involves an intermediate movement over a State highway, is not in interstate commerce.

CONCLUSION.

All the cases cited by the Commission in support of its position upon the ultimate question in this appeal involve a vindication of the rights of the States under the Tenth Amendment of the Constitution of the United States. In the present case it is the police power of the States under the Tenth Amendment that is at stake, and the exercise of that power in a very important area of the States' economies is involved. If the judgment below stands, grave doubt will be thrown upon the right of California (and other States to follow) in regulating intrastate transportation rates, to obtain information pertaining to carriers' revenues from transportation for the largest shipper in the State, or information pertaining to expenses incurred in rendering service to that shipper. The injunction is in very sweeping terms and prohibits the Commission "from taking *any* action or issuing *any* orders which would *interfere* with the United States and the various carriers in the State of California from [sic] entering into special arrangements with respect to rates for the transportation of property of the United States." (R. 257).

It is doubtful, therefore, if the Commission, in the shadow of this injunction, could ever determine the extent

to which other shippers were paying for transportation performed for the United States.

It has already been stated in a preceding part of this brief (supra, pp. 68, 69) that if the Court should hold that the States have no right to regulate rates for the intrastate transportation of property of the United States, it would be difficult to sustain the right of the States to regulate the rates of public utilities furnishing other kinds of services to the United States, with the result that civilian users of such services might have to bear a substantial but unknown part of the cost of rendering public utility services to the United States. The States have the right under the Tenth Amendment and a duty to protect their citizens against this kind of injustice.

California has not sought to discriminate against the United States, nor to hinder it in the performance of its sovereign responsibilities in maintaining the military establishment. California does not seek to preclude the United States from obtaining necessary transportation services, nor require it to pay more than others for such services. It seeks only to insure that the United States pay its fair share of the costs of transportation in California and to remove the unjust discrimination from which commercial shippers have been suffering.

". . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237. ". . . we should be slow to strike down legislation which the state concededly had power to enact because of

its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies, Inc., v. Milk Control Commission* (1942) 318 U. S. 261 275; 87 L. ed. 748, 756.

The Commission again respectfully urges the Court to remand this case to the District Court with instructions to dismiss the complaint for the reason that the District Court should not have entertained it. If, however, the Court has considered and wishes to decide the ultimate question in this proceeding, the Commission respectfully submits that the judgment of the District Court should be reversed, and that judgment should be entered for the defendant.

Dated, San Francisco, California,
October 15, 1957.

Respectfully submitted,

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(Appendices A, B and C Follow.)

Appendix A

Excerpts from United States Constitution

Article I, Section 8

The Congress shall have power * * *

[cl. 3] To regulate Commeree with foreign Nations, and among the several States and with the Indian Tribes;

[cl. 7] To establish Post Offices and post Roads;

[cl. 12]. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[cl. 13] To provide and maintain a Navy;

[cl. 16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress;

[cl. 17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

[cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing

Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 2

[cl. 1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—*between a State and Citizens of another State;* between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article IV, Section 3

[cl. 2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Article VI

[cl. 2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Au-

thority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

Federal Statutes

Armed Services Procurement

10 U.S.C. 2301 (70 A Stat. 641-677)

§ 2301. Declaration of policy

It is the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns.

10 U.S.C. 2302

§ 2302. Definitions

In this chapter—

(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary, of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Executive Secretary of the National Advisory Committee for Aeronautics.

(2) "Negotiate" means make without formal advertising.

(3) "Formal advertising" means advertising as prescribed by section 2305(a) and (b) of this title.

10 U.S.C. 2303

§ 2303. Applicability of chapter

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b),

and all services, for which payment is to be made from appropriated funds:

(1) The Department of the Army.

(2) The Department of the Navy.

(3) The Departmenet of the Air Force.

(4) The Coast Guard.

(5) The National Advisory Committee for Aeronautics.

* * * * * * *

10 U.S.C. 2304

§ 2304. Purchases and contracts: formal advertising; exceptions

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) the public exigency will not permit the delay incident to advertising;

* * * * * * *

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

* * * * * * *

(17) negotiation of the purchase or contract is otherwise authorized by law.

10 U.S.C. 2308

§ 2308. Assignment and delegation of procurement functions and responsibilities

Subject to section 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies—

(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and

(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.

10 U.S.C. 2311

§ 2311. Delegation

The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions under clauses (11)-(16) of section 2304(a), or section 2307(a) of this title. However, the power to make a determination or decision under section 2304(a) (11) of this title may be delegated only to a chief officer or official of that agency who is responsible for

procurement, and only for contracts requiring the expenditure of not more than $25,000.

10 U.S.C. 9742

§ 9742. Control of transportation systems in time of war

In time of war, the President, through the Secretary of the Air Force, may take possession and assume control of all or part of any system of transportation to transport troops, war material, and equipment, or for other purposes related to the emergency. So far as necessary, he may use the system to the exclusion of other traffic.

Miscellaneous

28 U.S.C., Sec. 1257(2) (62 Stat. 929)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: • • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity • • •

28 U.S.C. Sec. 1342 (62 Stat. 932)

The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. 1346 (62 Stat. 933)

(a) The district courts shall have original jurisdiction concurrent with the Court of Claims, of:

• • •

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. • • •

28 U.S.C. 1491 (62 Stat. 940)

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

States, or for liquidated or unliquidated damages in cases not sounding in tort.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority. • • •

28 U.S.C. Sec. 2201 (68 Stat. 890)

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States and the District Court for the Territory of Alaska, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

49 U.S.C. 65 (54 Stat. 954)

(a) Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of this title, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to chapters 1, 8, 12, and 13 of this title of any persons or property for the United States, or on its behalf, . . . *Provided further,* That section 5 of Title 41, shall not after September 18, 1940, be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required

can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

49 U.S.C. Sec. 22 (58 Stat. 751)

(1) Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments * * *

(2) All quotations or tenders of rates, fares or charges under paragraph (1) of this section for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, shall be in writing or confirmed in writing and a copy or copies thereof shall be submitted to the Commission by the carrier or carriers offering such tenders or quotations in the manner specified by the Commission and only upon the submittal of such a quotation or tender made pursuant to an agreement approved by the Commission under section 5a of this Act shall the provisions of paragraph (9) of said section 5a apply, but said provisions shall continue to apply as to any agreement so approved by the Commission under which any such quotation or tender (a) was made prior to the effective date of this paragraph or (b) is hereafter made and for security reasons, as hereinafter provided, is not submitted to the Commission: *Provided,* That nothing in this paragraph shall affect any liability or cause of ac-

tion which may have accrued prior to the date on which this paragraph takes effect. Submittal of such quotations or tenders to the Commission shall be made concurrently with submittal to the United States Government, or any agency or department thereof, for whose account the quotations or tenders are offered or for whom the proposed services are to be rendered. Such quotations or tenders shall be preserved by the Commission for public inspection. The provisions of this paragraph requiring submissions to the Commission shall not apply to any quotation or tender which, as indicated by the United States Government, or any agency or department thereof, to any carrier or carriers, involves information the disclosure of which would endanger the national security.

41 U.S.C. Sec. 5 (60 Stat. 809)

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $500, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638 of Appendix to Title 50, (2) when otherwise authorized by

law, or (3) when the reasonable value involved in any one case does not exceed $500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.

In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only.

Federal Property and Administrative Services Act of 1949

(63 Stat. 378, et seq.)

40 U.S.C. Sec. 471

It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

40 U.S.C. Sec. 472

As used in this Act.———

(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government including any wholly owned Government corporation.

(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate and the House of Representatives).

(c) The term "Administrator" means the Administrator of General Services provided for in title I hereof.

• • • • • • •

5 U.S.C. Sec. 630

(a) There is hereby established an agency in the executive branch of the Government which shall be known as the General Services Administration.

(b) There shall be at the head of the General Services Administration an Administrator of the General Services who shall be appointed by the President by and with the advice and consent of the Senate, and perform his functions subject to the direction and control of the President. • • •

• • • • • • •

40 U.S.C. Sec. 481

(a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

(1) prescribe policies and methods of procuresonal services, including related functions such as ment and supply of personal property and nonpercontracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and

(2) operate, and, after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1): *Provided,* That contracts for public utility services may be made for periods not exceeding ten years; and

(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;

Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the National Military Establishment from action taken or which may be taken by the Administrator under clauses (1), (2), (3), and (4) above whenever he determines such exemption to be in the best interests of national security.

• • • • • • •

40 U.S.C. Sec. 486

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(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency

shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

• • • • • • •

41 U.S.C. Sec. 251

The purpose of this title is to facilitate the procurement of supplies and services.

41 U.S.C. Sec. 252

(a) The provisions of this title shall be applicable to purchases and contracts for supplies or services made—

(1) by the General Services Administration for the use of such agency or otherwise; and

(2) by any other executive agency (except any agency named in section 2 (a) of the Armed Services Procurement Act of 1947), to the extent of and in conformity with authority delegated by the Administrator pursuant to the provisions of this subsection.

The Administrator may delegate to the head of any other such agency authority to make purchases and contracts for supplies or services pursuant to the provisions of this title (A) for the use of two or more executive agencies or (B) in other cases upon a determination by the Administrator that by reason of circumstances set forth in such determination such delegation is advantageous to the Government in terms of economy, efficiency, or national security. Notice of every such delegation of authority so made shall be furnished to the General Accounting Office.

• • • • • • •

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section

303, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000: *Provided,* That no agency other than the General Services Administration shall make any purchase of, or contract for, supplies or services in excess of $500 under this pararaph except in the exercise of authority conferred by the Administrator to procure and furnish supplies and services for the use of two or more executive agencies;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for supplies or services for which it is impracticable to secure competition;

(10) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided,* That beginning six months after the effective date of this title and at the end of each six-month period thereafter, there shall be furnished to

the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this paragraph (10) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(11) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(12) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(13) for supplies or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition: *Provided,* That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

(14) otherwise authorized by law.

* * * * * * *

40 U.S.C. Sec. 474

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(d) Nothing in this Act shall impair or affect any authority of—

• • • • • • •

(3) any executive agency named in the Armed Services Procurement Act of 1947, and the head thereof, with respect to the administration of said Act;

• • • • • • •

Rule 18, Revised Rules of Supreme Court of the United States.

Supersedeas on Appeal.

1. Whenever an appellant entitled thereto desires a stay on appeal, he may present for approval to a judge of the court whose decision is sought to be reviewed, or to such court action by that court is required by law, or, subject to paragraph 2 hereof, to a justice of this court, a motion to stay the enforcement of the judgment appealed from, • • •

Administrative Regulations

32 CFR, 1956 Supp.

§ 1.101 *Purpose of subchapter.* This subchapter, issued by the Assistant Secretary of Defense (Supply and Logistics), by direction of the Secretary of Defense, and in coordination with the Secretaries of the Army, Navy, and Air Force, establishes for the Department of Defense uniform policies and procedures relating to the procurement of supplies and services under the authority of the Armed Services Procurement Act of 1947, Public Law 413, 80th

Congress, as amended, 41 U.S.C. 151-161 (hereinafter referred to as "the act"), or under other statutory authorization.

[19 F.R. 3865, June 25, 1954]

§ 1.102 *Applicability of subchapter.* This subchapter shall apply to all purchases and contracts made by the Department of Defense, within or outside the continental United States, for the procurement of supplies or services which obligate appropriated funds (including available contract authorizations), unless otherwise specified herein.

[19 F.R. 7481, Nov. 20, 1954]

§ 1.112-1 *Policy.* In the interest of achieving uniformity in the field of government procurement, certain General Services Administration regulations, developed cooperatively by the Department of Defense and the General Services Administration, are made applicable to the Departments with respect to the procurement of supplies and services as defined in § 1.102. In order to insure compliance with the pertinent provisions of such General Services Administration regulations. Department of Defense application will be as follows:

(a) *General.* All policy and procedural matter of such General Services Administration regulations which is within the scope of this subchapter will be codified herein.

(b) *Interagency purchase assignment responsibility.* The applicable Department of Defense Directives covering the assignments of responsibility for the purchasing of

specific supplies under Interagency Purchase Assignment will be incorporated by reference in this subchapter.

(c) *Mandatory use of Federal Supply Schedule Contracts.* For Department of Defense implementation of Federal Supply Schedules, see § 5.103 of this subchapter. [19 F.R. 3866, June 25, 1954, as amended at 19 F.R. 7481, Nov. 20, 1954]

§ 1.112-2 *Method of incorporation in this subchapter.* General Services Administration regulations which are to be made applicable to the Departments will be incorporated into this subchapter in the manner set forth in § 1.112-1 (a), (b), or (c), prior to any required compliance therewith by the Departments.

§ 1.201-1 *Department.* The term "Department" includes the Department of the Army, the Department of the Navy, and the Department of the Air Force.

§ 1.201-7 *Procurement.* The term "procurement" includes, by way of description and without limitation, purchasing, renting, leasing, or otherwise obtaining supplies or services.

§ 1.300 *Scope of subpart.* This subpart sets forth general policies with respect to (a) methods of procurement, (b) sources of supply (including governmental and foreign sources), (c) types of contracts, (d) specifications, (e) transportation costs, and (f) responsible prospective contractors.

§ 1.301 *Methods of procurement.* It shall be the objective of each Department to use that method of procurement which will be most advantageous to the Government —price, quality, and other factors considered. The two

principal methods of procurement are by means of formal advertising and by means of negotiation. Procurement shall generally be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, all in accordance with the detailed requirements and procedures set forth in Part 2 of this subchapter. Procurement may be effected by negotiation, however, when authorized by and conducted in accordance with the detailed requirements and procedures set forth in Part 3 of this subchapter. Procurement may also be effected, as provided in Parts 4 and 5 of this subchapter, by such means as (a) coordinated procurement or (b) interdepartmental procurement.

§ 1.306-1 *General.* Proper consideration of transportation costs is necessary to insure that procurement is on the basis most advantageous to the Government. Contracting officers shall give consideration to the transportation factors set forth below which may affect such costs.

§ 1.306-4 *Commodity description.* A complete description of the commodity being purchased, including packing and packaging instructions, is necessary not only to enable the supplier to bid or quote properly on the requirement, but also for subsequent freight classification purposes.

§ 1.306-10 *Volume shipments.* Procurements involving volume shipments (as defined in Departmental instructions) shall be referred at the earliest practicable time to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates.

§ 1.306-11 *Unusually large or heavy shipments.* Prior to purchasing unusually large, heavy, high, wide, or long items, the appropriate military traffic management office shall be consulted in order that any transportation difficulties may be considered. Additional costs, such as the use or special equipment, excess blocking and bracing material, circuitous routing, etc., incident to these shipments shall also be considered, in conjunction with the freight rate, in determining total transportation costs.

[Amdt. 15, 21 F.R. 6702, Sept. 6, 1956]

§ 1.306-12 *Mode of transportation.* Generally, the military traffic management office is the proper authority to specify the mode and routing of shipments. If urgency in delivery is a factor, the appropriate military traffic management office shall be so informed in order that routing authorities may select the means of transportation consistent with the stated urgency.

§ 3.200 *Scope of subpart.* Subject to the limitations prescribed in Subpart A of this part, and pursuant to the authority of section 2 (c) of the act, procurement may be effected by negotiation and contracts may be entered into as a result of negotiation without formal advertising, under any one of the circumstances set forth in the following sections of this subpart.

§ 3.210-1 *Authorization.* Pursuant to the authority of section 2 (c) (10) of the act, purchases and contracts may be negotiated without formal advertising if:

* * * for supplies or services for which it is impracticable to secure competition.

§ 3.210-2

* * * * * * *

(j) When the contemplated procurement is for stevedoring, terminal, warehousing, or switching services, and when either the rates are established by law or regulation or the rates are so numerous or complex that it is impracticable to set them forth in the specifications of a formal solicitation of bids;

(k) When the contemplated procurement is for commercial ocean or air transportation, including time charters, space charters and voyage charters over trade routes not covered by common carriers (as to which, negotiation is authorized under the provisions of §§ 3.217 to 3.217-2 and section 321 of Part III of the Interstate Commerce Act of September 18, 1940, 49 U. S. Code 65), and including services for the operation of Government-owned vessels or aircraft;

§ 3.217-1 *Authorization.* Pursuant to the authority of section 2 (c) (17) of the act, purchases and contracts may be negotiated without formal advertising if:

* * * otherwise authorized by law.

§ 3.217-2 *Application.* This authority shall be used only if and to the extent approved for any Department in accordance with procedures prescribed by that Department.

§ 16.501 *Negotiated utility service contract forms.* This section prescribes forms for the negotiated procurement of utility services which, as used herein, includes only electric, gas, water, sewage, and steam services.

§ 16.501-1 *Estimated annual cost $2,400 or less (DD Form 671).* (a) Utility services shall be procured without a written contract when the supplier's rates are regulated by a Federal, State, or other public regulatory body and when the annual cost of the services to be procured is estimated at the time of initiation of the service to be $2,400 or less: *Provided,* That such services shall be procured by a written contract whenever—

(1) The supplier requires the execution of a contract or application form;

(2) A connection charge is involved; or

(3) The negotiation and execution of a contract is deemed to be advantageous to the Government.

(b) When utility services are purchased without written contract the citation of procurement authority, and the certification of receipt of service as billed by the supplier, will be accomplished in a simplified manner in accordance with departmental procedures. Rate schedules will not be required with each monthly billing when—

(1) The applicable rate schedule is in the possession of the procuring activity; or

(2) The invoice or billing indicates the total units of service rendered, the rate charged per unit, and the total charge.

(c) When the annual cost of the procurement is $2,400 or less and no connection charge is involved, but a written contract is required pursuant to paragraph (a) of this section, DD Form 671 (Negotiated Utility Service Contract) (Short Form) shall be used. Additional clauses, not inconsistent with those on the form, may be included in

accordance with departmental procedures. Deviations from the provisions of the form are authorized when necessary in order to comply with State or local laws and regulations.

(d) Procurement of utility services where a connection charge is involved shall be in accordance with departmental procedures.

§ 16.501-2 *Estimated annual cost over $,2400.* When the estimated annual cost of the services to be procured is over $2,400, the procurement shall be in accordance with departmental procedures.

§ 212.1 *Purpose.* This part prescribes a revised DD Form 677 (Motor Common Carrier Facilities Questionnaire), to be used by the military departments in securing certain essential information from motor common carriers.

§ 212.2 *Applicability.* This part is applicable to all departments within the Department of Defense.

§ 212.3 *General.* (a) DD Form 677[1] will be used by appropriate central traffic offices of the military departments for obtaining certain information required in routing freight shipments via motor common carriers (excluding household goods carriers) within the Continental United States. It will not ordinarily be used by individual shipping activities.

(b) The revision of DD Form 677[1] is not to be construed as requiring carriers to resubmit information which is now in the files of the military departments.

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[1]Filed as part of original document.

44 CFR, 1956 Supp.

§ 53.6. *Public utility services.* (a) Executive agencies, including wholly owned Government corporations and except as provided in paragraph (c) of this section, shall procure needed public utility services within the United States and its territories and possessions under applicable area-wide contracts therefor made by the General Services Administration from time to time. (Further information concerning such contracts may be obtained from the General Services Administration, Public Utilities Branch, Washington, D. C.)

(b) Contracts for public utility services within the United States and its territories and possessions entered into, in the absence of area-wide contracts as provided in paragraph (a) of this section, by executive agencies, including wholly owned Government corporations and except as provided in paragraph (c) of this section, shall be subject to such review as may be determined by the General Services Administration.

(c) This section does not apply to: (1) the Federal Bureau of Investigation, the Atomic Energy Commission, the Tennessee Valley Authority and the Central Intelligence Agency, except to the extent these agencies find compliance therewith will not interfere with their programs; and (2) the production, distribution and sale of public utility services by an executive agency.

(d) As used in this section, the term "public utility services" includes, without limitation, all public utility services procurable from a public utility company; such as, light, heat and power by electricity; gas, water and steam;

communications by telephone, telegraph, teletypewriter, cable and radio, and facilities for such services.

§ 53.21 *Routing.* Executive agencies, except the Post Office Department, the Department of Agriculture, the National Military Establishment, and the District of Columbia Government, shall obtain from the Federal Supply Service, Washington, D. C., routing orders to cover the shipment of their supplies consisting of two or more carloads moving under a Government bill of lading within continental United States from one point of origin to one destination, in the absence of an emergency or waiver granted by the Director, Federal Supply Service.

§ 54.25 *Telephone service contract.*

* * * * * * *

TERMS AND CONDITIONS

This contract is subject to all rates, charges, rules practices (including the practice as established by the contractor and applicable to its other customers for determining charges or credits for fractional parts of a billing month), or requirements which may be lawfully established. * * *

* * * * * * *

5. *Authority for changes in charges and general changes.* If changes are approved or ordered by any legally constituted authority having jurisdiction, or otherwise lawfully established by the contractor, which affect the charges for exchange service, or any of the terms of an existing contract or of these instructions, the subscriber shall be notified thereof by the contractor promptly in writing, and requested to prepare and forward to the

contractor signed Standard Form No. 40, covering the change involved.

NOTICE

Department of Defense

Office of the Secretary

Exemption of Department from Certain Provisions Under Title II of the Federal Property and Administration Services Act.

1. By virtue of the authority vested in me under Section 201 (a), Title II of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C.A. 481(a)) I have determined it to be in the best interests of national security for the Department of Defense to be exempt from action taken or which may be taken by the Administrator of the General Services Administration under Section 201(a) (1), (3) and (4) of said Act in (a) the prescription of policies and methods of procurement and supply of transportation and traffic management, (b) the performance of functions related to procurement and supply of transportation and traffic management, and (c) *the representation* in negotiations with carriers and *in proceedings involving carriers before Federal and State regulatory bodies* in transportation and traffic management.

2. The Department of Defense will continue to cooperate with the General Services Administration in transportation and traffic management matters of mutual interest. In those instances in which the General Services Administration and Department of Defense have mutual

interest and common objectives the Department of Defense will continue to act jointly with the General Services Administration.

3. This exemption shall become effective at 12:01 A.M., e.s.t., Oct. 2, 1954.

C. E. Wilson
Secretary of Defense

Appendix C

California Constitution

Article XII, Section 22

The Railroad Commission is continued in existence as the Public Utilities Commission, which shall consist of five members. * * * *

Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff.

California Public Utilities Code

Section 211(d). "Common carrier" includes . . . (d) Every highway common carrier and every petroleum irregular route carrier operating within this State.

Section 213. "Highway common carrier" means every corporation . . . owning . . . any auto truck . . . used in the business of transportation of property as a common carrier for compensation over any public highway in this State between fixed termini or over a regular route. . . .

Section 215. "Between fixed termini or over a regular route" means the termini or route between or over which any highway common carrier usually or ordinarily oper-

ates any auto truck or other self-propelled vehicle, or any passenger stage corporation usually or ordinarily operates any passenger stage, even though there may be departures from such termini or route, whether such departures be periodic or irregular.

Section 216(a). 'Public utility' includes every common carrier . . . . where the service is performed for or the commodity delivered to the public or any portion thereof.

Section 486. Every common carrier shall file with the commission . . . schedules showing the rates . . . for the transportation between termini within this State of persons and property . . . .

Section 493. No common carrier . . . shall engage or participate in the transportation of persons or property, between points within this State, until its schedules of rates . . . have been filed . . . .

Section 494. No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property . . . than the applicable rates . . . specified in its schedules filed . . . .

Section 1733. Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before the effective date, or the order shall stand suspended until the application is granted or denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be de-

nied, unless the effective date of the order is extended for the period of the pendency of the application.

Section 1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

Section 1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

Section 1761. The pendency of a writ of review shall not of itself stay or suspend the operation of the order or

decision of the commission, but during the pendency of the writ the Supreme Court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision.

Section 1762. Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended the order suspending it shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage, but the Supreme Court may grant a temporary stay restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay when, in its opinion irreparable loss or damage would result to petitioner unless such temporary stay is granted. Such temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice. The hearing of such application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.

Section 1763. No temporary stay shall be granted by the Supreme Court unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a

motion for a stay as provided in this article. Every such temporary stay shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed 10 days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay is granted without notice the matter of the issuance of a stay shall be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay.

Section 1764. In case the order or decision of the commission is stayed or a temporary stay granted, the order of the court shall not become effective until a suspending bond is executed and filed with and approved by the court, payable to the people of the State of California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all money which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sus-

tained. The court, in case it stays or suspends the order or decision of the commission in any matter affecting rates or classifications, may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court prescribes, all sums of money which it collects from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended.

Section 3502. The use of the public highways for the transportation of property for compensation is a business affected with a public interest. It is the purpose of this chapter to preserve for the public the full benefit and use of public highways consistent with the needs of commerce without unnecessary congestion or wear and tear upon such highways; to secure to the people just and reasonable rates for transportation by carriers operating upon such highways; and to secure full and unrestricted flow of traffic by motor carriers over such highways which will adequately meet reasonable public demands by providing for the regulation of rates of all transportation agencies so that adequate and dependable service by all necessary transportation agencies shall be maintained and the full use of the highways preserved to the public.

Section 3511. "Highway Carrier" means every corporation . . . engaged in transportation of property for compensation or hire as a business over any public highway in this State by means of a motor vehicle. . . .

Section 3571. No highway contract carrier or rad highway common carrier shall engage in the business transportation of property . . . without first having tained from the commission a permit . . . .

Section 3663. In the event the commission establish minimum rates for . . . highway permit carriers, the ra shall not exceed the current rates of common carriers land . . . .

Section 3664. It is unlawful for any highway per carrier to charge or collect any lesser rate than the mi mum rate or greater rate than the maximum rate est lished by the commission . . . .

Section 3666. If any highway carrier other than common carrier desires to perform any transportation accessorial service at a lesser rate than the minim established rates, the commission shall, upon finding t the proposed rate is reasonable, authorize the lesser rat

Section 3737. Upon the issuance by the commissi of any decision or order made applicable to a particu class or group of carriers, or to particular commodit transported or areas served, the commission shall se a copy of the decision or order without charge upon e carrier affected. Upon the issuance of a permit to oper as a highway carrier, the commission shall serve with charge upon the carrier a copy of each tariff, decision, order previously issued that is then applicable to the cl or classes of transportation service the carrier intends perform. Each carrier shall observe any tariff, decisi or order applicable to it after service thereof.

Section 3738. In all proceedings instituted by or pending before the commission pursuant to this chapter, the commission may from time to time make such interim, interlocutory, or other orders as it deems advisable. No such order shall operate as a final determination of the proceeding, and the commission may at any time thereafter make such further orders as it deems advisable with respect to the matters considered and determined in the order or to other matters involved in the proceeding.

Section 3739. After the making of an interim, interlocutory, or other order, any party to the proceeding or any stockholder or bondholder or other party pecuniarily interested in the highway carrier affected may file a petition for rehearing, within the time and for the reasons provided in Sections 1731 to 1736, inclusive. The commission may act upon the petition within the time and in the manner provided in Sections 1731 to 1736, inclusive.

Section 3740. Any interim, interlocutory, or other order may be reviewed as provided in Sections 1756 to 1759, inclusive. Upon such review, only that portion of the record in the proceeding considered by the commission and upon which it acted in making the order sought to be reviewed, need be certified to and considered by the Supreme Court.

Section 3942. No carrier shall engage in the business of transportation of property for compensation by motor vehicle over any public highway in any city in this State without having first obtained from the commission a permit authorizing such operation. Any carrier desiring a

permit shall file a petition therefor with the commission. The petition shall be in such form and contain such information as is prescribed by the commission.

Section 4013. It is unlawful for any carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this article.

Section 5133. Except as provided in Section 5133.5, no household goods carrier shall engage in the business of the transportation of used household goods and personal effects, office, store, and institution furniture and fixtures for compensation, by motor vehicle over any public highway in this State, unless there is in force a permit issued by the commission authorizing such operations.

Section 5192. In the event the commission establishes minimum rates for transportation services by household goods carriers, the rates shall not exceed the current rates of common carriers by land subject to the Public Utilities Act for the transportation of the same kind of property between the same points.

Section 5193. It is unlawful for any household goods carrier to charge or collect any lesser rate than the minimum rate or greater rate than the maximum rate established by the commission under this chapter.

Minimum Rate Tariff No. 2, California Public Utilities Commission

Item 20. . . . Radial highway common carriers, highway contract carriers . . . may deviate from the minimum

rates named in this tariff in connection with the transportation of property for the armed forces of the United States . . . .

"**Item 30.** . . . the rates in this tariff apply for transportation of shipments between all points within the State of California. . . .

Items 40 and 41 Series. Rates in this tariff apply for the transportation of all commodities, except the following:

Civil Code

Section 2114. A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties. . . .

Section 2169. A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 23

IC UTILITIES COMMISSION OF THE STATE
CALIFORNIA,

Appellant,

vs.

ED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

Because of the fact that Appellee's brief was received only a few days ago, and due to the further fact that counsel for the Appellant must take the time to journey to Washington for the argument of the above-entitled case on January 7th, and the exigencies of time resulting therefrom, Appellant is able to reply to only a limited number of matters raised in the brief of Appellee. How-

ever, by filing this limited reply brief, the Appellant wishes it distinctly understood that it is not admitting the validity of any of the several contentions made by the Appellee in its brief.

I.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA IS BOTH A COURT (JUDICIAL TRIBUNAL) AND AN ADMINISTRATIVE AGENCY AND IS LAWFULLY COMPETENT TO PASS UPON THE CONSTITUTIONALITY OF SECTION 530 OF THE PUBLIC UTILITIES CODE.

Unlike any other regulatory agency of which we are aware, the Public Utilities Commission of California is both a judicial tribunal and an administrative tribunal. The judicial power which the Commission exercises is the judicial power of the State of California, such jurisdiction having been taken away from the courts of California and deposited with the Commission pursuant to Article XII of the State Constitution and the Public Utilities Act. The judicial authority exercised is not merely quasi-judicial; it is strictly judicial in every respect. (*Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 650, 689; *People v. Western Air Lines*, 42 Cal. (2d) 621, 630-632; *Sexton v. A. T. & S. F. Ry. Co.*, 173 Cal. 760, 762-764.) Even in the exercise of its administrative-legislative jurisdiction, the Commission acts strictly judicially. (*Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 650; *People v. Western Air Lines*, 42 Cal. (2d) 621, 630-632.) The Supreme Court of California has held that the Commission exercises judicial power of great moment. (*Pacific Telephone and Telegraph Co. v.*

Eshleman, 166 Cal. 640, 650.) The Commission and each member thereof have the same power to commit for contempt as does any court of record. (Section 22, Article XII, Constitution of California.) As an illustration of the quality of the judicial power exercised by the Commission, the Commission has authority to set aside a final judgment of a state court (Superior Court) even though such judgment had been affirmed by the Supreme Court of California. (*Miller v. Railroad Commission*, 9 Cal. (2d) 190, 195, 198.) Until reversed by the Supreme Court of California, decisions of the Commission must be respected by all state courts. (*Loustalot v. Superior Court*, 30 Cal. (2d) 905, 912.) No state court except the Supreme Court has any jurisdiction over the action of the Commission. (Section 1759, Public Utilities Code.) The Public Utilities Act is the supreme law of the state (so far as state law is concerned) in all matters touching public utility regulation and takes precedence over any provision of the State Constitution or of a statute which conflicts therewith. (*Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, 658; *Pickens v. Johnson*, 42 Cal. (2d) 399, 404.) The regulatory authority of the Commission is exclusive. (*Pacific Telephone and Telegraph Co. v. City of Los Angeles*, 44 Cal. (2d) 272, 280.)

As this court well knows, it is elementary that there is no Federal constitutional inhibition against a state combining in one agency both judicial and legislative powers. (*O'Donoghue v. United States*, 289 U.S. 516, 545-546, 77 L. ed. 1356, 1368.)

The foregoing answers the contention of Appellee that the Public Utilities Commission cannot provide a forum

for testing the constitutionality of Section 530 of the Public Utilities Code.

II.

THE CONTENTION MADE BY APPELLEE THAT SECTION 530 OF THE PUBLIC UTILITIES CODE, IF ENFORCED, WOULD SUBJECT AGENTS OF THE UNITED STATES TO PENAL ACTION IS WHOLLY WITHOUT FOUNDATION.

The contention made by the Appellee that an agent of the Federal government would subject himself to the penal provisions of Section 2112 of the Public Utilities Code, or any other penal provision of California law, by paying for transportation something other than the rate approved by the Commission, is wholly without foundation. This court held in the case of *United States v. Farrar*, 281 U.S. 624, 634, 74 L. ed. 1078, 1081, that the purchaser of illicit liquor did not commit a crime by such act even though it was admitted that the purchaser knew that the liquor was illicit and that the sale thereof constituted a violation of law. This court held in that case that only the seller violated the law. Merely purchasing a commodity with knowledge that it is being sold in violation of law constitutes no crime, unless the statute so specifies.

Additionally, no action would be taken against an agent of the United States, in the circumstances here presented, and we speak with authority because any penal action taken against an agent of the United States must be initiated by the attorney for the Public Utilities Commission. The attorney for the Commission represents the People of the State of California and the Commission

in all matters involved under the Public Utilities Act. (Section 307, Public Utilities Code.) It is here pointed out that Part 1 of the Public Utilities Code is the Public Utilities Act and Section 530 of the Code is a part of the Public Utilities Act, as are the penal provisions contained in Sections 2101-2113 of that Code. There are two provisions of the Public Utilities Act which denounce as unlawful the conduct of a shipper which are found in Sections 458 and 459 of the Public Utilities Code.[1]

It will be noted from the language of these two sections that something far more than merely paying for trans-

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[1]458. No common carrier, or any officer or agent thereof, or any person acting for or employed by it, shall, by means of knowingly false billing, classification, weight, weighing, or report of weight, or by any other device or means assist, suffer, or permit any corporation or person to obtain transportation for any person or property between points within this State at less than the rates and fares then established and in force as shown by the schedules filed and in effect at the time.

No person, corporation, or any officer, agent, or employee of a corporation shall, by means of false billing, false or incorrect classification, false weight or weighing, false representation as to contents or substance of a package, or false report or statement of weight, or by any other device or means, whether with or without the consent or connivance of a common carrier or any of its officers, agents, or employees, seek to obtain or obtain such transportation for such property at less than the rates then established and in force therefor.

459. No person or corporation, or any officer, agent, or employee of a corporation, shall knowingly, directly or indirectly, by any false statement or representation as to cost or value, or the nature or extent of an injury, or by the use of any false billing, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, or upon any false, fictitious, or fraudulent statement or entry, obtain or attempt to obtain any allowance, rebate, or payment for damage, in connection with or growing out of the transportation of persons or property, or an agreement to transport such persons or property, whether with or without the consent or connivance of a common carrier or any of its officers, agents, or employees. No common carrier, or any of its officers, agents, or employees, shall knowingly pay or offer to pay any such allowance, rebate, or claim for damage.

portation at a price other than the tariff rates must be engaged in before the provisions of those two sections would be violated by a shipper. The provisions of Section 2112 of the Public Utilities Code, which Appellee appears to fear, cover the denounced conduct in Sections 458 and 459 and further prescribe that anyone who procures, aids, or abets any public utility in violation or non-compliance is guilty of a misdemeanor. Obviously, under the well recognized rules of strict construction of penal statutes, there would have to be proven some conspiracy or some conduct over and above the mere paying for transportation at some rate other than the tariff rate to violate Section 2112 of the Code. Furthermore, where, as here, the United States is setting up a claim of constitutional and statutory immunity, no penal action would be taken against an agent of the United States until the claim of immunity had been finally adversely determined in the courts.

The undersigned attorney for the People of the State of California and the Commission unhesitatingly makes the foregoing as a stipulation.

Should this court reverse the judgment of the District Court and order the dismissal of the complaint, the only action which would be taken by the Commission or its attorney, in case a carrier violated any order of the Commission establishing rates for traffic of the United States pursuant to the provisions of Section 530 of the Public Utilities Code, would be either an administrative proceeding before the Commission, to discipline the carrier, in which proceeding all defenses based on the ground of immunity of the United States could be presented, or by

the filing of a penal action in the Superior Court of California against the carrier, where an opportunity would be available to present any and all defenses on the ground of immunity of the United States. These proceedings would go through the state courts and finally reach this court. The Commission has full authority to stay the effect of any of its orders promulgated pursuant to the provisions of Section 530 of the Public Utilities Code pending the outcome of litigation, and the Supreme Court of California, also, has such authority. So it will be seen that the fears of the Appellee with regard to any penal action to be taken against an agent of the United States are wholly without foundation.

Of course, the foregoing proceeds upon the theory that there would not be any agreement or reconciliation arrived at by and among the Commission, the carriers, and the United States. We firmly believe that some reasonable program would be arrived at, thus making wholly inapplicable any thought of penal action being taken against either the carriers or any agent of the United States.

III.

APPELLEE MISCONSTRUES THE TRUE PURPOSE OF THE JOHNSON ACT.

Appellee contends that the Johnson Act has no application to the United States. Using Appellee's own expression, this contention is misplaced. The Johnson Act *deprives* a United States District Court of all jurisdiction with regard to a rate order of a state agency, if certain requirements are met. Therefore, there is no forum to

which the United States may resort in a case of that kind because the jurisdiction has been *withdrawn*. This court has held in many cases that the United States District Court is a court of *limited* jurisdiction and that it has only such jurisdiction as Congress has seen fit to confer upon it. If Congress so desired, it could withdraw all jurisdiction from the United States District Court. Thus, it is seen that this is not a question of jurisdiction as to parties, but is a question of jurisdiction as to the court itself. (*Kline v. Burke Construction Co.*, 260 U.S. 226, 233-234, 67 L. ed. 226; *People v. Bruce* (C.C.A. 9th 1942), 129 F. (2d) 421, 423, certiorari denied by Supreme Court, 317 U.S. 678, 87 L. ed. 544; *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376, 84 L. ed. 329, 333.)

Dated, San Francisco, California,
December 31, 1957.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 20 1957
JOHN T. FEY, Clerk

No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1957

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 200–237) is reported at 141 F. Supp. 168.

JURISDICTION

The judgment of the district court was entered on June 5, 1956 (R. 256–257), and notice of appeal was filed on July 31, 1956 (R. 257). Probable jurisdiction was noted on December 3, 1956 (R. 987). The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b).

QUESTION PRESENTED

Whether procedurally and substantively the district court acted correctly in declaring unconstitutional, and in enjoining the enforcement of, a California law authorizing the California Public Utilities Commission to limit, and impose conditions on, special arrangements between common carriers and the United States to transport property for the United States at reduced rates between points within the state.

STATUTES AND REGULATIONS INVOLVED

Section 530 of the California Public Utilities Code, as amended, California Statutes 1955, Ch. 1966, par. 1, provides in pertinent part:

> Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> (a) Persons for the United States, * * *.
>
> * * * * *.
>
> The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers as defined in the Highway Carriers' Act.

Pertinent sections from the Armed Services Procurement provisions, 70A Stat. 127 (10 U. S. C. 2301,

et seq.); the Johnson Act, 62 Stat. 932 (28 U. S. C. 1342); the Interstate Commerce Act, as amended, 58 Stat. 751 (49 U. S. C. 22); the Transportation Act of 1940, 54 Stat. 954, as amended; various Defense Department, Army, Navy, and Air Force Regulations; and the California Public Utilities Code are set forth in the Appendix, *infra*, pp. 62–77.

STATEMENT

This is an appeal by the Public Utilities Commission of California from the judgment (R. 256–257) of a three-judge district court which found that Section 530 of the Public Utilities Code of California, as applied to the United States, contravened the Federal Constitution, and which permanently enjoined the Commission from interfering with the making of special arrangements between the United States and carriers in the state with respect to transportation of property of the United States.

For many years, the United States has followed the practice of negotiating special agreements with carriers as to the rates governing transportation of the Government's property (R. 244). While some Government property has moved at ordinary commercial rates, its property, particularly that of the armed forces, has usually been transported at negotiated rates substantially equal to or lower than those applicable to commercial shipments (R. 377–379, 402, 597–598, 605). Section 22 of the Interstate Commerce Act, 49 U. S. C. 22, exempts transportation for the United States from the rate provisions of that Act, and Section 530 of the Public Utilities Code of Cali-

fornia, prior to its amendment in July, 1955, sanctioned the practice as to intrastate shipments in California (R. 244–245).

Section 530, before the 1955 amendment, provided that every common carrier "may transport, free or at reduced rates, * * * property for the United States * * *."[1] The amendment eliminated authority to transport property of the United States free or at reduced rates, and substituted the provision that the Commission "may permit" common carriers to transport property for the United States and the state at reduced rates "to such extent and subject to such conditions as it may consider just and reasonable." Since the Code requires every common carrier to file its tariff schedules with the Commission and prohibited any deviation from filed rates (Secs. 486, 494), under the amended section, except as authorized by the Commission, common carriers can no longer transport property of the United States at rates below those in their filed tariffs.[2]

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[1] The same right was given with respect to transportation for State, county or municipal governments. The section applies to common carriers subject to the provisions of part 1 of the Code. These constitute common carriers by land, water, and motor (Pub. Util. Code, Sec. 211).

[2] The section as amended further provided that the amendment shall not prevent a common carrier from transporting property of the United States "at reduced rates no lower than rates which lawfully may be assessed and charged * * * by highway permit carriers * * *." (Under Section 3515 of the Code, a "highway permit carrier" is a carrier by motor other than a common carrier or a petroleum irregular route carrier.) Under authority given the Commission to establish minimum rates

In this situation, the United States instituted the present proceeding. The complaint asked the district court to declare Section 530 unconstitutional insofar as it prohibits carriers from transporting Government property at rates other than those approved by the Commission, and to grant injunctive relief (R. 9). The United States also sought and was granted a temporary restraining order barring any action by the Commission which would interfere with the United States in the making of special arrangements with carriers as to rates for the transportation of Government property (R. 9, 11–12).

The Commission filed a motion to dismiss the Government's complaint (R. 15–16). After denial of this motion (R. 198), it filed an answer (R. 199) and the

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for these permit carriers (Sec. 3662), it had from time to time issued minimum rate orders, and had incorporated in the minimum rate tariff applicable to all commodities, other than those expressly excepted, a provision authorizing deviation from the named minimum rates in connection with "transportation of property for the armed forces of the United States" (App. Br. 8–9; Appendix to App. Br. 39). This deviation authorization, while it remained in effect, would allow common carriers to reduce their rates on certain property transported for the armed forces of the United States to the level of the rate at which any permit carrier transported property for these forces. In order to avoid this automatic exemption, after passage of the bill to amend Section 530, the Commission, on August 16, 1955, entered an order cancelling the deviation authorization for permit carriers as of the date the amendment to Section 530 became effective, September 7, 1955, but on the request of the Department of Defense, on September 6, 1955, it postponed the cancellation to December 5, 1955 (App. Br. 10, 14–17). After the district court restrained the enforcement of Section 530 (see text, this page), the Commission continued the postponement of cancellation until disposition of this case (R. 102–104).

ase went to trial. The Government's twelve wit-
esses were, in the main, officers charged with pro-
urement of transportation for Government property
or the armed services. The Government's evidence
ealt with the effect on transportation of supplies and
aterials for the armed forces of the United States,
nd the additional burdens which would be cast on
he Government, if the rates for such transportation
etween points in California) were subject to the
risdiction and control of the Commission. The
ommission called three witnesses who denied that
he law would result in such effect and burden.

The district court rendered an opinion in which it
oncluded that Section 530 contravenes the provisions
the Federal Constitution (R. 237). Subsequently
filed detailed findings of fact (R. 240–253), and con-
usions of law (R. 253–256), and entered a judgment
hich permanently enjoined appellant from taking
ny action "which would interfere with the United
tates and the various carriers in the State of Cali-
rnia from entering into special arrangements with
spect to rates for the transportation of property of
e United States" (R. 257).

The following summarizes the principal facts found
the district court:

Because of the 152 military installations and the
reraft and missile industries in California, there is a
ry large volume of military traffic between points in
at state (Fdg. 11, R. 241). The pattern of military
affic differs from commercial traffic in several re-
ects; thousands of military items have no counter-
art in commercial trade commodities; it is often

necessary to ship a great many diverse items in one shipment; the necessity for urgent shipment may arise on very short notice; because of the location of military installations, shipments are often made to points which have no relation to the normal flow of trade; and many military items are of highly secret nature and at times must be secretly and circuitously routed for purposes of security (Fdgs. III–V, R. 242–243). The Government has met these peculiar requirements of its transportation problem by entering into special arrangements with the carriers (Fdg. VIII, R. 244).

Three types of rates are involved: the class rate, the commodity or commercial rate, and the "freight all kinds" rate. A common carrier is required to publish a rate to cover the shipment of every known item between every conceivable point; this rate is the class or "paper rate" (Fdg. XII, R. 246). Very little commercial traffic moves at the class rate (*ibid.*) The large commercial shipper usually negotiates, subject to approval of the appropriate regulatory agency, rates with the carriers (known as "commercial rates"), which are especially adapted to the volume and nature of the commerce involved (*ibid.*). Finally, because of the peculiar nature of military operations, where hundreds of diverse items for the supply of a division or a vessel may be needed at one place at one time, the Government often negotiates a single rate for an entire movement (the "freight all kinds" rate) (Fdg. XIV, R. 247).

Were the amendment to Section 530 to become effective, serious interference with federal transportation functions would result. Because of the nature,

origin and destination of many military items, no commercial rate exists for much of the military traffic, and some shipments would therefore be delayed for Commission action unless shipped under established class rates, requiring the Government to pay 50% to 100% more than would the commercial shipper (Fdg. XIII, R. 247). The "freight all kinds" rate would be unavailable to the Government, and it would therefore be necessary for its shipping personnel to classify and segregate hundreds of items for the most economical shipment (Fdg. XIV, R. 247–248). And (although its counsel stipulated that for the present the authority would not be exercised) the Commission, in order to establish appropriate rates for movement of the Government's property, would have the authority to require information of a secret nature. Further, general information as to military movements (the particular items, their origin and destination, and the amounts of their movement) would have to be disclosed to the State Commission, thus possibly making available to enemy agents the pattern of this country's military movements (Fdg. XVIII, R. 249). The delays, increased administrative burden and expense, and danger to security that would result from the application of Section 530, as amended, would be multiplied many times in time of war (Fdg. XXIII, R. 252).

The court's major conclusion of law was that the Commission's regulation of the rates for the intrastate shipment of military material would so drastically interfere with the officers of the United States in discharging their responsibility of supplying the

defense establishments, and would so endanger the security of the United States, as to contravene the provisions of the Constitution vesting the obligation to provide for the national defense in the Federal Government (R. 254).

SUMMARY OF ARGUMENT

I

A. The complaint states "a case of actual controversy" within the meaning of the Declaratory Judgment Act (28 U. S. C. 2201). The United States asserts the constitutional right to obtain, free from state interference, intrastate transportation of its property pursuant to agreement with common carriers. Section 530 of the California Public Utilities Code, which the California Commission has the duty to enforce (and, indeed, has taken affirmative steps to make effective), by specifically providing that the United States may obtain such transportation only with the state's permission, contravenes this claim of right. The limitation on the right of the United States to contract arises automatically from the statute and is not dependent on Commission action. The conflicting claims, asserted by adverse parties, thus give rise to a controversy which admits of an immediate and definitive determination.

B. Exhaustion of administrative remedies is not required where the questions presented are not within the agency's authority to determine. Here, the question presented is the constitutionality of the act which the California Commission must administer; it is well settled that, in the absence of express statutory

authorization, an administrative agency has no power to determine the constitutionality of its enabling legislation. Nor was resort to the Commission necessary to an order to eliminate several alleged "doubts about local law" (App. Br. 57–58), since, however these doubts were resolved, the statute would still be a forbidden regulation of federal functions by state authorities.

C. The trial court properly exercised its equitable jurisdiction in view of the absence of other adequate remedies at law. Under the California law, the Government could not have obtained injunctive relief by suit in the California courts. And, to have petitioned for rehearing of the Commission's collateral cancellation order of the permit carrier exemption (see fn. 2, pp. 4–5, *supra*) and then applied for review of the Commission's order by the Supreme Court of California would, even if successful, have given only partial relief. Under that procedure, important areas of Government traffic would still be subject to the operation of Section 530. The United States could not obtain determination of the constitutional question by defending an action at law brought by the carrier to recover the published rate, since that rate, if within the zone of reasonableness, would be binding absent an agreement to transport at a lower rate. Moreover, the complaint alleged, and the evidence supported the district court's findings of, irreparable injury arising from impairment of the federal defense functions.

D. The Johnson Act, 28 U. S. C. 1342, did not prohibit a grant of the requested injunctive relief, since that Act does not apply to suits instituted by

the United States. In any event, the Act's prohibitions run against enjoining an "order" of a state administrative agency in specified circumstances; here, the Government's complaint attacked the state statute, not any "order" issued under it.

E. In large part, this case turns on an evaluation of the effect of a state statute on maintenance of the armed forces—a national issue which federal courts are uniquely equipped to decide. No interpretation of the statute or consideration of local law can fundamentally affect the resolution of this issue. The trial court thus clearly was not required by comity considerations to abstain from action pending state proceedings.

II

Apart from the constitutional immunity protecting federal functions from state interference, the application of Section 530 to United States defense shipments squarely conflicts with specific procurement regulations having the force of law. Defense Department, Army, Navy, and Air Force regulations direct the selection of transportation means by military officers without regard to state rate policies or rates, and specifically require the negotiation of rates below "applicable current rates" for commercial traffic where such negotiation is deemed appropriate by transportation personnel. In this direct conflict between national law and state law, the supremacy clause of Article VI of the Constitution requires that the state law must give way. *Miller* v. *Arkansas*, 352 U. S. 187.

III

As the law of federal immunity has developed since *McCulloch* v. *Maryland*, 4 Wheat. 316, this Court has held, both in the tax cases and with respect to other types of regulatory statutes, that nondiscriminatory taxation or regulation of Government contractors or agents is permissible so long as there is no substantial interference with the carrying out of the Federal functions. However, there has been no withdrawal from the original holding that it is beyond the power of the states to impose direct regulation or taxation on the Federal Government. It is also clear that, if the burden through indirect regulation interferes with the federal function, it, too, is unconstitutional.

Section 530 of the Public Utilities Code of California is unconstitutional in its application to the transportation of property for the United States because it constitutes a direct regulation of a federal activity. It makes it illegal for the United States to enter into special agreements with carriers to transport United States property. It is thus clearly distinguishable from the situation where the regulation is imposed upon contractors with the United States and the effect on the United States is only the indirect burden of additional cost. Here, California seeks to direct the nature of contracts to be made by the United States and seeks to impose criminal penalties on employees of the United States who violate the law. The case is thus different from *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261, which this Court found imposed the regulation only on the milk companies and left the United States free to buy at any

price it could. On the contrary, this case is closer to *Arizona* v. *California*, 283 U. S. 423, and *Johnson* v. *Maryland*, 254 U. S. 51, where the regulation was direct.

But even if the application of Section 530 could be considered to be indirect, it would still be unconstitutional because it places a substantial burden on a federal function. The doctrine that a nondiscriminatory regulation of a contractor with the United States is permissible, even though it causes an increased financial burden on the United States, does not permit the states to "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. 134). The court below correctly found that Section 530 does substantially hamper national defense (R. 237).

Under California's regulation, the "freight all kinds" (FAK) rate, under which a very substantial portion of the military traffic in California moves, would be unavailable (or at most, would be permitted only in "certain unusual circumstances" (R. 638–639)). Military shipping officers, in view of controlling military regulations, would therefore have to classify and segregate the hundreds of items involved in the movement according to published tariffs, and to rearrange the boxing or loading of the items. Further, whereas the Government's present bill of lading for the FAK movement contains only a brief generic description of the items involved for identification purposes at destination, it would be required, under California's regulation, to describe completely each item for classification and rating purposes. This

process of classification, segregation, and detailed description would interfere with the federal transportation function by delaying shipments and placing an additional work burden on shipping personnel. Clearly, a state is not empowered to deny to shipping officers of the United States choice of the most appropriate method of shipment.

Even if it be assumed that the California Commission would attempt to cooperate by giving favorable consideration to negotiated rates for government shipments, the procedures for getting approval would result either in delay in shipment or, if some provision for retroactive approval could be devised, in uncertainty which would make impossible the choice of the most appropriate method of handling a shipment.

The evidence showed that the imposition of state regulation would imperil the secrecy which is essential for many military shipments. The nature, quantity, and destination of many defense supplies is information which is closely guarded. At present, negotiations are carried on with a single representative of the carriers who has the highest security clearance. The material is sometimes shipped without identification and by circuitous routes. The California Commission could not pass upon the reasonableness of rates for such shipments without obtaining the secret information. Nor could this objection be met by a voluntary abstention of the Commission from the exercise of its authority on the receipt of a certificate that a shipment involved security matters. The requirement of the certificate from a federal of-

ficer is itself beyond the state's power. Moreover, it is unconstitutional to vest authority in the state commission to demand such information, whether or not it undertakes to exercise that authority.

ARGUMENT

Under Point I we shall discuss the various grounds urged by the appellant in support of its contention that the district court should have granted its motion to dismiss the complaint. Under Points II and III the Government urges that regulation by the appellant of the rates charged for transportation of property for the United States is unconstitutional because it is inconsistent with valid federal law and regulations and furthermore infringes the constitutional immunity of the United States to state regulation.

I

THE DISTRICT COURT PROPERLY ENTERTAINED THE COMPLAINT

A. THE LITIGATION IS A "CASE OF ACTUAL CONTROVERSY" WITHIN THE MEANING OF THE DECLARATORY JUDGMENT ACT

Appellant argues (Br. 39-41) that the Government's complaint does not describe an "actual controversy" within the meaning of the Declaratory Judgment Act (28 U. S. C. 2201). The Act authorizes a proceeding thereunder in "a case of actual controversy," and it applies only to controversies "which are such in the constitutional sense." *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–240; *Nashville, Chattanooga & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264. Such a controversy exists if there is "a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an

adversary proceeding upon the facts alleged." *Aetna Life Insurance Co.* v. *Haworth*, at 241.

That is this case. The United States asserts the constitutional right to obtain, free from state interference, intrastate transportation of its property pursuant to agreement with common carriers. The statute, which the Commission has the duty to enforce, provides that the United States may obtain such transportation only with the state's permission, and thereby contravenes this claim of right. These conflicting claims, asserted by adverse parties, give rise to a controversy which admits of an immediate and definitive determination of the legal rights of the litigants.

Appellant contends (Br. 40) that the complaint was defective because it failed to allege that the Commission had applied or was about to apply Section 530 to shipments made by the Government. Plainly no such allegation was necessary. Under the statute, it is unlawful for a common carrier to deviate from its filed tariffs (*supra*, p. 4). When Section 530 was amended so as to eliminate the permission previously conferred to carry property for the United States at reduced rates, the statute by its own force, and without further Commission action, made reduced rates for Government property unlawful. Appellant itself has stressed that the amendment to Section 530 "was self-executing in important areas of government traffic; that is to say, no further action whatever, by anyone, was necessary to subject to rates previously established for commercial shippers the traffic of all United States government agencies in certain

special commodities, and traffic of the civilian agencies in all commodities." App. Br. 44. In fact, sanctions became applicable both to the carriers and their agents and to the contracting officers of the shippers for disregard of the existing rates (California Public Utilities Code, Secs. 2107, 2110, 2112).[3]

Furthermore, the Commission had actually taken affirmative action to make Section 530 effective prior to the filing of the Government's complaint. While Section 530 became immediately applicable on its effective date (September 7, 1955), as a practical matter the section's application was seriously curtailed as long as transportation of the "general commodities" of the armed forces continued to be exempt from the minimum rates established by the Commission for permit carriers (see footnote 2, *supra*, pp. 4–5).[4] The Commission's cancellation of the exemption for permit carriers was specifically made to give

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[3] Sec. 2112 provides:

"Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

[4] The exemption affected the rates common carriers might charge because Section 530, as amended, authorized them to transport property of the United States at reduced rates provided they were not lower than the rates "lawfully" chargeable by permit carriers (see *supra*, p. 2).

effect to the change in law caused by the amendment to Section 530 (R. 91), and this change in law was also the basis, after the Commission's first postponement of the cancellation date, for its refusal to grant a second postponement (R. 97, 101).

In short, under Section 530, as amended, the statute itself stood as a barrier to reduced rates for transportation of Government property and, if we look beyond the face of the statute, the Commission had taken specific action to implement the statutory barrier. Since the statute is in derogation of the right claimed by the Government, it gave rise to an actual controversy which is not dependent upon a showing of threatened enforcement. Cf. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456. And the judgment which the district court entered could and will (unless judgment is reversed) end the controversy.[5]

Appellant's reliance (App. Br. 53) on *Public Service Commission of Utah* v. *Wycoff*, 344 U. S. 237, is misplaced. In that case a carrier sought a judgment in the federal district court declaring it to be engaged in interstate commerce, with the purpose of using that judgment as a defense in any suit the state commission might bring against it. This Court pointed out that no such suit had been brought, that even if the carrier were in interstate commerce, it could be subject to some degree of state control, and that it was therefore impossible to ascertain, outside

[5] The complaint properly named the Commission as respondent since it was the agency charged with carrying out the provisions of Section 530.

the context of an actual suit by the state commission, what controversy, if any, would develop between the parties. 344 U. S. at 244–246.

The instant case differs markedly from *Wycoff*. Here the Government is not seeking relief in order "*to guard against the possibility*" (*Wycoff*, at 244) that the Commission will assume jurisdiction over the rates charged for the transportation of its property. The statute itself limits transportation at reduced rates to the situation where there has been prior Commission approval, and the Commission's jurisdiction would be invoked only in seeking exercise of its discretionary authority to permit reduced rates which, without that authorization, are prohibited. The "concrete controversy" as to whether the Government has the constitutional right to obtain transportation service, free from state control over the charge therefor, and of whether Government agents may follow their instructions to negotiate contracts without state approval, is thus squarely presented.[6]

B. THE COMPLAINT WAS NOT BARRED BY REASON OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

At the time the Commission canceled its order authorizing permit carriers to transport certain Gov-

[6] For similar reasons, *Public Utilities Commission* v. *United Air Lines*, 346 U. S. 402, where the Court in a *per curiam* order, citing *Wycoff*, ordered dismissal of the suit, is inapposite. There the air carrier sought a judgment declaring the particular operation involved to be of an interstate nature and enjoining any possible regulation by the state commission of the operation. The record, however, showed that the state commission's regulatory proceedings were of an investigatory nature, and that the controversy between the parties had not yet developed to a concrete stage.

ernment property for the armed services without regard for the minimum rates applicable to transportation of property of private persons, the Defense Department (through the Navy Department) sought and obtained postponement of the date of cancellation. When a second request for postponement was denied, the United States initiated the instant suit. Appellant contends (Br. 55–57) that the Government could have requested rehearing of the cancellation order and could have sought certiorari review of an adverse Commission decision by the California Supreme Court, which review would embrace any question of constitutional violation, with right of appeal to this Court on a question of constitutionality. Appellant therefore alleges that the Government improperly failed to exhaust available administrative remedies (App. Br. 59).

But the question to be determined is whether the California statute contravenes the Federal Constitution in vesting in the Commission power to exercise control over rates charged for the transportation of Government property. To have raised this question before the Commission would have been to ask it to pass on the constitutionality of the very act which it administers. The statute does not expressly give the Commission this power, and it has been held that an administrative agency has no inherent power to determine the constitutionality of its enabling legislation. *Engineers Public Service Co.* v. *S. E. C.*, 138 F. 2d 936, 952–953 (C. A. D. C.); *Panitz* v. *District of Columbia*, 112 F. 2d 39 (C. A. D. C.).[7]

[7] See, also, *Central Nebraska Public Power & Irr. Dist.* v. *F. P. C.*, 160 F. 2d 782 (C. A. 8), certiorari denied, 332 U. S. 765;

Pursuit of administrative relief is not required where the only question presented as a basis for relief is not within the agency's authority. *Panitz* v. *District of Columbia, supra; Southern Blvd. R. Co.* v. *City of New York, infra; Buder* v. *First National Bank,* 16 F. 2d 990, 993 (C. A. 8). Appellant cites (Br. 59) *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752, and *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535, as cases where this Court required exhaustion of administrative remedies even though constitutional issues were involved. But both cases presented other issues whose administrative resolution might make it "possible that nothing will be left of appellant's [constitutional] claim" (331 U. S. at 772). The Court therefore concluded that it was all the more imperative not to anticipate the administrative decision. In the instant case, however, no administrative determination would eliminate the constitutional issue. As the appellant admits, the law is automatically effective without the necessity of administrative orders (*supra,* p. 16).

Appellant urges (Br. 57–58) that a proceeding before it, and subsequently the California Supreme Court, was needed in order to eliminate several

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Southern Blvd. R. Co. v. *City of New York,* 86 F. 2d 633 (C. A. 2), certiorari denied, 301 U. S. 703; Davis, *Administrative Remedies,* 19 F. R. D. 437, 451–455.

An administrative agency can, of course, consider the constitutional issue with respect to the applicability of legislation to particular facts. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Engineers Public Service S. Co.* v. *S. E. C.,* 138 F. 2d 936, 953 (C. A. D. C.).

"doubts about local law" on which the constitutionality of the statute may turn. But it is our position, as stated in our discussion of the merits, that even if each of these doubts is resolved in favor of the appellant, the statute would still significantly interfere with federal officers in the discharge of their duties and would still conflict with procedures established by Congress or by valid regulations, so that it would be unconstitutional in any event. It follows that it is unnecessary to obtain determination by the California courts of questions of state law not decisive of the constitutionality of the statutory provision here under attack.*

In *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 465, this Court said:

> "The Commission in this case has not yet done more than assert its jurisdiction over United's rates. It has not yet held a hearing upon the reasonableness of United's present rates;

*Cases involving statutes of Louisiana, Pennsylvania, and Texas which presented the same ultimate issue as the instant case were instituted in state courts, but in these cases it was necessary to determine whether the applicable statutory provisions applied to shipments of property of the United States, an explicit provision of the California statute. The Supreme Court of Louisiana held that its statute did so apply. *Kansas City Southern Ry. Co.* v. *Louisiana Public Service Commission*, 225 La. 399. In Texas a district court and the court of civil appeals reached the same conclusions concerning the Texas statute. *Railroad Commission of Texas* v. *United States*, 290 S. W. 2d 699, now pending on writ of error to Texas Supreme Court. The Pennsylvania Superior Court found the Pennsylvania statute applicable to Government shipments and upheld its constitutionality. *United States* v. *Pennsylvania Public Utilities Commission*, decided September 30, 1957, now pending on petition for review by the Pennsylvania Supreme Court.

> it has made no finding whether these rates are unlawful and whether new rates should be substituted; it has not entered upon an inquiry to determine what rates would be just and reasonable.

The Court, nevertheless, affirmed the award of injunctive relief because the State Commission's orders were "plainly invalid" and would result in "injury not assessable in money damages, not only to appellee but to the public interest" (317 U. S. at 468–469).[9]

C. THIS WAS A PROPER CASE FOR EXERCISE OF EQUITABLE JURISDICTION

The following discussion as to the availability of alternative legal remedies and irreparable injury is pertinent only to the question of whether injunctive relief was properly granted. Such matters are irrelevant to the propriety of granting declaratory relief. 28 U. S. C. 2201 (declaratory relief may be awarded "whether or not further relief is or could be sought"); Rule 57, Federal Rules of Civil Procedure; Borchard, *Declaratory Judgments*, 2d ed., 315–316, 340–342; 62 Harv. L. Rev. 787, 808. Since declaratory relief may be granted independently of any request for injunctive relief, it follows that, even were the appellant correct in its arguments as to alternative remedies and irreparable injury, the district court properly retained jurisdiction of the suit to rule on that portion of the complaint which sought a declaratory judgment as to the constitutionality of Section 530 (R. 1).

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[9] See also, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Allen* v. *Grand Central Aircraft Co.*, *supra*, at 540–541.

1. *No other adequate remedy*

Although the exercise of equitable jurisdiction to enjoin enforcement of a statute is not well founded if other adequate remedy at law is available (*Hillsborough* v. *Cromwell*, 326 U. S. 620, 622), legal remedies, to displace equity jurisdiction, must be "as complete, practical and efficient as [the remedy] which equity could afford" under the same circumstances. *Terrace* v. *Thompson*, 263 U. S. 197, 214; *Gormley* v. *Clark*, 134 U. S. 338, 349. In the instant case no adequate alternative remedy existed.

The Government could not have obtained injunctive relief by suit in the California courts. Section 526 of the California Code of Civil Procedure, Appendix, *infra*, p. 76, forbids an injunction "[t]o prevent the execution of a public statute by officers of the law for the public benefit", and the California Public Utilities Code (Sec. 1759, Appendix, *infra*, p. 76) forbids any state court, "except the Supreme Court to the extent specified in this article", from interfering with the Commission in the performanace of its official duties. Clearly, therefore, no direct suit in the state courts could have afforded the relief sought and obtained in the present suit—that is, a determination of the validity of the statute, with a stay of its operation during pendency of the suit.[10]

[10] Appellant suggests (Br. 55–57) that the Government could have obtained adequate relief by petitioning for rehearing of the Commission's order cancelling the exception for permit carriers (see fn. 2, pp. 4–5, *supra*), and then applying for review of the Commission's order by the Supreme Court of California (Pub. Util. Code, Sec. 1756). The suggested proceeding would not, however, provide an adequate remedy. Although the ex-

Appellant suggests (Br. 51) that the constitutional question could be determined through the medium of an action by a carrier against the United States in the Court of Claims or a district court to recover charges based upon its filed rates. This method of procedure is wholly illusory. The United States would be liable for the filed rates absent agreement to transport at lower rates, and no such agreement can be expected to be made following the amendment to Section 530 because to do so would subject the carrier to substantial penalties. (See Pub. Util. Code, Secs. 532, 2107.) [11]

Appellant also urges (Br. 72–73) that a California common carrier must transport property notwithstanding dispute as to the proper charges, and that the Government therefore could insist on shipment and, in defending an action at law to recover the published rate, set up as a defense the unconstitutionality of state control over the rate. But, as previously stated,

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emption for permit carriers was included in Section 530 by reference, nevertheless, even if the exemption were reinstated, its application would be limited to the armed services so that no relief would be provided for the other branches of the Government. Moreover, even as to the armed services, the exemption was not applicable to the transportation of such commodities as petroleum, fresh fruits and vegetables, and livestock (App. Br. 43). The appellant itself has stressed that Section 530 was effective before the exception for permit carriers was cancelled (App. Br. 44).

[11] In *Hughes Transportation, Inc.* v. *United States*, 121 F. Supp. 212 (Ct. Cl.), the carrier sued for the difference between the state's prescribed rates and the rates negotiated, but in that case apparently neither the Government nor the carrier was aware of the requirements of state law during the period in question. 121 F. Supp. at 216. In any event, the appellant may not rely on the decision in *Hughes* since the case has been reopened

the published rate, if within the zone of reasonableness, would be binding, absent agreement to transport at a lower rate. The fact that state law barred such agreement would be irrelevant.[12]

2. Irreparable Injury

With respect to the element of irreparable injury, as a prerequisite to the grant of injunctive relief,[13] the complaint alleged that the change in law effected by the amendment to Section 30 "would greatly impede the discharge by the United States of its constitutional powers and responsibilities" and would "expose to the public patterns of movement and

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on application of the United States and is now being held pending the outcome in this case.

[12] Appellant is also mistaken in the underlying premise of its argument. Neither Section 2169 of the California Civil Code (Appendix to App. Br. 39) nor any of the cases cited by Appellant (App. Br. 72) establish that a carrier must transport property tendered for shipment at below the state commission's minimum rates. The issues before the courts in the cited cases were wholly different from the instant issue; indeed, in *Corbett v. Atlantic Coast Line R. Co.*, 205 N. C. 85, 87, the court made clear that the carrier's duty to accept shipments applied to "freight duly tendered with proper freight charges under existing tariffs * * *."

[13] In addition to the attack on the sufficiency of the complaint, the appellant also makes the separate assertion that, at trial, the Government failed to prove that the enforcement of Section 530 would cause it irreparable injury so as to justify the issuance of an injunction (App. Br. 89-124). In presenting this argument, the appellant in large part ignores the fact that the district court made detailed findings related to this issue (R. 246-252). The court's ultimate conclusion was that a denial of relief "would hamper the national defense" (R. 237). Obviously, if these findings are supported by the evidence, there was ample ground for granting the relief, and it is equally plain from the court's statement of the evidence that its findings were amply supported.

traffic which * * * might jeopardize the security of the United States" (R. 4). It further alleged that the long established rate structure in California "will be completely disrupted" with "attendant confusion, delay and expense"; that the cost of transporting property for the United States "would be immeasurably increased from the very moment that the section was put into effect"; and that the United States could not be compensated by bond or otherwise for the resulting increased expense to it during the period in which the statute was in force (R. 8). On these allegations we submit that it was clearly not an abuse of discretion to view the complaint as setting forth grounds for grant of injunctive relief.

On the other hand, the appellant's claims of injury to the California intrastate carrier system are not based on the pleadings. The restraining order issued by the district court merely "maintained the *status quo* pending a determination on the merits. Moreover, at the trial, the appellant conceded that the California transportation system, including the trucking industry, is sound and in "reasonably good financial health"; and that trucking revenues reached an all-time high in the 1954–1955 fiscal year, which "has been one of freight rate stability" (R. 694). Nothing that the appellant now asserts indicates a change. On balance, the equities lie with the Government.

B. THE DOCTRINE OF PRIMARY JURISDICTION DID NOT REQUIRE REFERRAL OF THE CASE TO THE STATE COMMISSION

Appellant contends (Br. 60–61) that the complaint should not have been entertained because it raise[d]

an issue within the primary jurisdiction of the Commission. Appellant bases its contention on the allegation of the complaint that the class rate under which the United States would have to ship in many situations is "unrealistically high" as compared with "the commodity rates negotiated by commercial concerns" for shipments of like density and volume (R. 4–5).

Assuming appellant's special competence to decide this question, the short answer is that determination of the Government's right to the relief it sought did not require resolution of the question, nor did the district court resolve it.[14] The question at issue was whether state control over rates to be charged for transportation of Government property constituted, in the circumstances existing in California, an unconstitutional interference with federal officers in the discharge of federal duties and functions. Obviously, this is not a question calling for exercise of the expertise of a state administrative agency. The question was fully within the competence of a three-judge federal district court. See *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10; *Panitz* v. *District of Columbia*, 112 F. 2d 39, 41–42 (C. A. D. C.); Moore, *Commentary on the U. S. Judicial Code*, p. 52.

E. THE JOHNSON ACT DID NOT PROHIBIT GRANT OF THE REQUESTED INJUNCTIVE RELIEF

Appellant contends (Br. 63–70) that the district court should not have awarded injunctive relief in

[14] It found that in many instances class rates would be 50% to 100% higher than the commercial rate for shipments of similar character (R. 217), a fact not disputed by appellant's rebuttal witnesses.

view of the Johnson Act (28 U. S. C. 1342, Appendix, *infra*, p. 63), which provides that under certain conditions district courts shall not enjoin the enforcement of rate orders issued by state agencies. But, under the settled rule of construction that "statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect" (*United States* v. *United Mine Workers*, 330 U. S. 258, 272; *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 224–225), the Act should be construed not to apply to suits instituted by the United States. There is no legislative history indicating a purpose to subject the United States to the limitations imposed by the Act. See *Kansas-Nebraska Nat. Gas Co.* v. *City of St. Edward, Neb.*, 135 F. Supp. 629, 640 (D. Neb.).

In any event, the prohibitions of the Johnson Act run against enjoining any "order" of a state administrative agency affecting rates chargeable by a public utility, where jurisdiction is based solely on diversity of citizenship or repugnance of "the order" to the Federal Constitution. Here, the Government's complaint attacked the state statute, not any "order" issued under it. It was the statute itself, as amended, which made it unlawful for a common carrier to transport property of the United States at rates less than those set forth in its filed tariffs. Action by the Commission to enforce the statute, whether a court proceeding to enjoin further violation or a proceeding to recover penalties for violation (Pub. Util. Code Secs. 2102, 2104), would not in any sense be an "order" of

the Commission "affecting rates chargeable by a public utility."

F. CONSIDERATIONS OF COMITY DID NOT REQUIRE THE DISTRICT COURT TO ABSTAIN FROM GRANTING INJUNCTIVE RELIEF

Appellant's concluding jurisdictional argument (Br. 75–83) is that the district court should have abstained from granting relief in order to preserve comity in the relationship of the Federal Government and the State of California. Although in certain circumstances federal courts should abstain from deciding cases which turn on questions of state law,[32] here there are present none of the special circumstances which properly impel abstention. The questions of state law and procedure have little or no bearing on the issue of constitutionality. While local factors are involved, the issue is whether they can be given precedence over national interests. The case turns on an evaluation of the effect of a state statute on maintenance and operation of our armed forces—a constitutional or national issue which federal courts are uniquely equipped to decide. Cf. *Johnson* v. *Maryland*, 254 U. S. 51; *Mayo* v. *United States*, 319 U. S. 441. In *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 225–226,

[32] Thus, federal courts should abstain where a state court's ruling on an uninterpreted state statute or an undecided question of state law might render decision of a constitutional question unnecessary (*Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450); or where the case involves a specialized aspect of a technical system of local law outside the normal competence of a federal court (*Burford* v. *Sun Oil Co.* 319 U. S. 315, 332); or where "predominantly local factors" are presented and the plaintiff itself had initiated a state proceeding but failed to exercise its statutory right of appeal (*Alabama Commission* v. *Southern Railroad Co.*, 341 U. S. 341, 348–349).

this Court said that the policy of preventing conflict between federal and state courts "is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." While these views were expressed with reference to the application to the United States of a statute prohibiting a federal court from enjoining a proceeding in a state court except under the conditions specified in the statute, the Court's reasoning equally bears upon the analogous question of voluntary abstention by a federal court in a case involving a suit by the United States to enjoin the operation of a state statute.

In substance, appellant's argument is that federal courts should abstain in every instance of federal-state controversy. In *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 468–469, *supra*, this Court, after adverting to the usual rule that federal courts "should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction," declared: "But this, too, is a rule of equity and not to be applied in blind disregard of fact."

II

THE CALIFORNIA STATUTE CANNOT BE APPLIED TO FEDERAL TRANSPORTATION PROCUREMENT BECAUSE IT IS INCONSISTENT WITH FEDERAL LAW REGULATING SUCH PROCUREMENT

Aside from the constitutional immunity protecting the Federal Government's activities, the application of Section 530 to United States shipments would

squarely conflict with specific federal regulations, validly promulgated under legislation governing procurement by the United States. It follows under the supremacy clause of Article VI of the Constitution that the state law must give way.[16]

A comprehensive scheme of procurement policies is found in 10 U. S. C. 2301–2314 (70A Stat. 127–133) App., *infra*, pp. 62–63 (a recodification, without any substantial change, of the Armed Services Procurement Act of 1947, 62 Stat. 21, formerly 41 U. S. C. 151–161), and the regulations promulgated under these provisions, as here pertinent (Department of Defense Regulations, 32 C. F. R., c. I (A) (1957); Army, Navy and Air Force Regulations on Transportation and Travel, App., *infra*, pp. 65–75). These regulations have the force of law. *Miller* v. *Arkansas*, 352 U. S. 187; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 484; *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 389–90.

The standards, with which federal officials are directed to comply, and the judgments they are expected to exercise are expressed in detail. The procurement provisions in Title 10 contemplate that the great majority of contracts for supplies and services will be placed through competitive bidding, but that in certain situations the public interest requires purchases to be made by negotiation. 10 U. S. C. 2304, App., *infra*, p. 63; see H. Rep. No. 109, 80th

[16] *Miller* v. *Arkansas*, 352 U. S. 187; *Franklin National Bank* v. *New York*, 347 U. S. 373; *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232; see *Penn Dairies, Inc.* v. *Milk Control Commission*, *supra*, 271–278.

Cong., 1st Sess., p. 3; S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. There are set forth 17 situations in which contracts may be negotiated without advertising, including, among others, where the public exigency will not allow delay (10 U. S. C. 2304 (a) (2)), where it is impractical to secure competition (10 U. S. C. 2304 (a) (10)), and where the services or supplies are such that the purchase or contract should not be publicly disclosed (10 U. S. C. 2304 (a) (12)). See App. *infra*, p. 62. It is pursuant to these provisions, and particularly 10 U. S. C. 2304 (a) (10), that the military officers have negotiated with the carriers for transportation of the armed forces property.[17]

The Department of Defense and the several departments comprising the Defense establishment have issued numerous regulations specifically implementing the statute as to procurement of transportation services.[18] These regulations reflect the determination that such services shall be obtained through negotiation, and, where appropriate in the opinion of the procurement officers, at rates lower than those which may be current for commercial traffic. Thus, Armed Services Procurement Regulation 1.306–10, App.,

[17] The Senate Report on the 1947 Act states that Section 2 (c) (10) (now Section 2304 (a) (10), "is intended to place the maximum responsibility for decisions as to when it is impracticable to secure competition in the hands of the agency concerned" (S. Rep. No. 571, 80th Cong., 1st Sess., p. 8).

[18] The Secretary of the Army is empowered, under 10 U. S. C. 3012 (g), App., *infra*, p. 63, to "prescribe regulations to carry out his functions, powers, and duties under this title." For similar provisions as to the heads of the other defense establishments, see 5 U. S. C. 22, 10 U. S. C. 6011, 8012 (f) App., *infra*, p. 63.

infra, p. 66, provides that procurements involving volume shipments "shall be referred * * * to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates." The preceding regulation 1.306–9, App. *infra*, p. 66, specifies that while "carriers are required by both Federal and State laws to charge all shippers equally for like services rendered", nevertheless "freight rates are often lower for the Government traffic" when it possesses more favorable transportation characteristics (greater volume, less likelihood of damage, heavier loading, etc.); and it requires rate information to be obtained from the appropriate military traffic management office. Army Regulation 55–142 (par. 2, a) dated April 19, 1956, App., *infra*, pp. 66–67, specifies that in the routing of domestic freight traffic, "[t]he least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation." See also, A. R. 55–105, par. 4 (a) (1), App., *infra*, p. 66. Navy regulations (Navy Shipping Guide, Part. I, art. 1800 (d) (3) (20), App., *infra*, p. 70) refer to the negotiation of "more equitable rates" when "applicable freight rates appear excessive". Finally, the pertinent Air Force regulation (AFM 75–1, par. 80501 (b), App., *infra*, pp. 73–74), implementing an explicit Department of Defense instruction (DOD 4520.3, February 2,

1956, App., *infra*, p. 75), provides for "negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules * * * after a determination has been made as to the unreasonableness * * * of effective rates, charges or rules * * *."[19]

There is thus a direct conflict between the amended California statute and these federal regulations. The regulations direct the selection of transportation means without regard to state rate policies or rates, since, as we shall show, *infra*, pp. 49–58, consideration of such policies or rates would result in substantial interference with the effective discharge of the military function; and, specifically, the regulations require the negotiation of rates below applicable current rates (which have presumably been established by the carrier before the appropriate regulatory body in connection with commercial traffic), where such negotiation is deemed appropriate by the military transportation personnel. California, however, has now attempted to impose its policies on federal transportation procurement, and to permit federal officers to negotiate rates below the "current applicable" ones only where its Commission sanctions such a reduced rate. In such a direct conflict between state law and the national transportation procurement policy established by valid federal regulations, the state law must give way. *Miller* v. *Arkansas*, *supra*. In that case, this Court compared certain

[19] There has recently been established a single agency, Military Traffic Management Agency (MTMA), to handle the traffic management functions of the three services (Department of Defense Directive No. 5160.14, May 1, 1956, 21 F. R. 4355). Presumably it will coordinate the regulation referred to.

Armed Services Procurement Regulations with the provisions of an Arkansas licensing law applicable to federal contractors, and, upon finding a conflict, held the state law inapplicable to the United States. The same holding is compelled by the instant conflict between state and federal regulations.[20]

Appellant argues (Br. 136–142) that the Armed Forces Procurement law is not antagonistic to state rate regulation, and, in fact, expressly contemplates such regulation. In support of this, appellant cites the Senate Report which, in analyzing the provision in Section 2304 (a) (10) for negotiation "when it is impracticable to secure competition", refers to fields "where prices are set by law or regulation" (S. Rep. No. 571, 80th Cong., 1st Sess., p. 8). But full examination of the legislative history undermines appellant's contention. The draft of the proposed bill which became the Armed Forces Procurement Act of 1947 was prepared by the Navy and War Departments, and contained the provision in question (Hearings on H. R. 1366, before a House Subcommittee of the Committee on Armed Services, 80th Cong., 1st Sess., v. 1, pp. 424–433). The comments of the Departments show that it was designed primarily to cover "such services as are the subject of lawful monopolies, *e. g.*, electric power" (*id.* at 429; see, also, pp. 453–454, 473–474, 528; House Report No. 109 on H. R. 1366, 80th Cong., 1st Sess., pp. 8–9). At the

[20] Again, the appellant's reliance on *Penn Dairies, Inc.* v. *Milk Control Commission*, *supra*, is without substance. The Army's regulations there involved were explicitly found to have left the question as to the applicability of state price legislation to the courts (318 U. S. at 276–78).

later Senate Hearings, the Department spokesman stated that the provision was intended to apply in three situations (Hearing on H. R. 1366 before the Senate Committee on Armed Services, 80th Cong., 1st Sess., p. 15):

> 1. Where the nature of the supply or service is such that only one person can furnish it, for example, a patented or secret article.
>
> 2. Where the price of the supply or service has been legally fixed.
>
> 3. Where the practical circumstances are such that it would be difficult to secure real competitive proposals by means of advertising for formal bids.
>
> [illustrations in stevedoring services, chartering of vessels, and ship repairs omitted].

The second situation undoubtedly had reference to federal price controls which had only recently been lifted. It certainly is unlikely that the defense establishments, in requesting authority to negotiate, were urging that they be subjected to any and all state regulations as to rates or charges, irrespective of their effects on the armed forces' functions.[21] And, specifically, nothing in the legislative history supports the contention that they were seeking to restrict their long established authority to negotiate for transportation services, free from state regulation with all its burdensome effects.[22] In the circumstances, such a

[21] In view of the exemption of the armed services from the rates for interstate transportation, provided by Section 22 of the Interstate Commerce Act (49 U. S. C. 22), it is inexplicable that they would have recommended restriction of intrastate transportation by state commissions.

[22] It had been held administratively since at least 1909 that State laws governing the rates to be charged by common car-

decision cannot be imputed to Congress. Cf. *Penn Dairies* v. *Milk Control Commission*, *supra*, at 275.

Appellant relies on the fact that certain Armed Forces Procurement Regulations (Section 3.210-2 (j); Section 16.501-1; 32 C. F. R. 3.210-2 (j), 16.501-1, Appendix to App. Br., pp. 22-25), in calling for negotiation of contracts as to specified utility services or stevedoring services, refer to the rates for such services being established by "law or regulation" or "regulated by a Federal, State, or other public regulatory body * * *." But such reference is in line with the legislative history previously detailed. The significant fact is that there is no similar reference in the several regulations dealing with the important area of transportation procurement. On the contrary, as we have shown, these regulations clearly look to

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riers do not apply when the contract of carriage is with the United States. See *Contracts for Transportation*, 15 Decisions of the Compt. of the Treasury 648.

The regulation as to utility services (16.501-1) provides that such services shall be procured without a written contract when the supplier's rates are regulated and the annual cost is estimated to be $2,400 or less. Where the estimated cost exceeds that figure, "procurement shall be in accordance with departmental procedures" (Sec. 16.501-2, 32 C. F. R. 16.501-2, Appendix to App. Br. 25); and under the broad powers vested in the procurement officers (App., *infra*, pp. 70-71), rates below those specified in commercial tariffs filed with the State regulatory agency may be, and at times are, negotiated. Indeed, even where the services are estimated to be less than $2,400, they are to be procured by a written contract whenever the "negotiation and execution of a contract is deemed to be advantageous to the Government" (Sec. 16.501-1 (a) (3)). But cf. A. F. R. 91-5, par. 12.

negotiation, where deemed appropriate, of rates below those set by the regulatory agencies. Similarly, appellant's reliance (Br. 146) on Department of Defense regulations authorizing its personnel to participate "in proceedings involving carriers before Federal and State regulatory bodies" is misplaced. These regulations deal with special situations[38] and cannot be construed as a general acceptance by the United States of state regulation of the rates charged for Government shipments.

Appellant also points out (Br. 134) that Congress, in repealing land-grant rates in the Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. 65, App., *infra*, p. 65), imposed upon the United States the obligation to pay the "full applicable commercial rates" (subject to the exception in Section 22), and, in a proviso, exempted procurement officers from the advertising requirements of 41 U. S. C. 5 "when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed." From this, appellant concludes that the statute manifests

[38] Army Regulation 55-27, App., *infra*, pp. 67-68, makes clear that appearances before State regulatory bodies are appropriate in connection with a carrier's request for new operational authority or to discontinue an existing operation. Cf. A. F. M. 75-1, pars. 80602(2)(b), 80603.

[39] Prior to 1940, the United States had enjoyed a 50% reduction in the rates assessed by land grant railroad for the transportation of persons and property for the United States. The 1940 Act continued that reduced rate as to the transportation of military property and personnel. In 1945, this exemption of the military from the 1940 Act was withdrawn (Act of December 12, 1945, 59 Stat. 606).

a clear "recognition of local rate regulation as a substitute for competitive bidding" (Br. 134). But 49 U. S. C. 65 applies only to common carriers subject to the Interstate Commerce Act, and thus, has no application to the present intrastate commerce question.[26] Even if it were pertinent, this provision does not recognize "local rate regulation as a substitute for competitive bidding." By its express terms, it is subject to the provisions of Section 22, which authorizes the transportation of United States property free or at reduced rates.[27] In the circumstances, the proviso cannot be construed as anything more than an authorization to negotiate for transportation services.

Finally, appellant refers (Br. 135–6) to the fact that Section 22 of the Interstate Commerce Act (49 U. S. C. 22) was reconsidered in the 84th and 85th Congress, the latter amending the section to require that reduced rate tenders or quotations be in writing

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[26] It should also be noted that Section 5 of Title 41, referred to in Section 65, is inapplicable to the procurement of supplies or services by the Armed Services. See 10 U. S. C. 2311.

[27] The legislative history of the 1945 amendment to Section 65, withdrawing the exemption as to military property and personnel, emphasizes the continuing applicability of Section 22. See S. Rep. No. 552 on H. R. 694, 79th Cong., 1st Sess., p. 3; H. Rep. No. 333 on H. R. 694, 79th Cong., 1st Sess., p. 2. And the bill's sponsor, Senator Wheeler, made the following statement (91 Cong. Rec. 9316):

"I am saying that in the future, even though this bill shall be enacted, * * * the executive branch of the Government can say to the railroads, 'We feel that, because of the amount of traffic we are shipping over the railroads, we should have a reduced rate.' They should negotiate with the railroads, if the bill is passed, for a proper rate, if they are not getting one. * * * This bill does not change in the slightest degree section 22 of the act. * * *"

and be filed with the Interstate Commerce Commission (Public Law 85–246, 85th Cong.; 71 Stat. 564). But this recent reconsideration of the policy embodied in Section 22 does not support appellant's position. For the significant fact is that Congress, after extensive hearings[28] and thorough reexamination of the problem, did *not* pass the bill (the so-called Hinshaw Bill, H. R. 525, 84th Cong.) which would have repealed the right of carriers to transport property of the United States free or at reduced rates. Instead, Congress decided to continue that right with only the minor amendment noted. We submit that this is a further indication of a national transportation purpose, and that California, absent affirmative Congressional authorization (*Mayo* v. *United States*, 319 U. S. 441, 448), "may not interfere with the carrying out of [that] national purpose." *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 103.

III

STATE CONTROL OVER THE RATES TO BE PAID FOR TRANSPORTATION OF PROPERTY FOR THE UNITED STATES UNCONSTITUTIONALLY REGULATES THE FEDERAL GOVERNMENT AND INTERFERES WITH FEDERAL FUNCTIONS, SPECIFICALLY NATIONAL DEFENSE

With respect to the constitutional immunity of the United States from state regulation, the appellant argues (Br. 124–131) that state regulation of the rates charged for transporting property for the Federal Government pursuant to Section 530 is constitutional

[28] See Hearings on H. R. 525 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 1st and 2d Sess.

because, even assuming that it will impose an increased economic burden on the Government, the holding of *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U. S. 261, is that nondiscriminatory state regulation which imposes such a burden is permissible. But California's regulation of these rates has effects which go beyond increased costs to the Government. It substantially interferes with the performance of federal transportation functions and directly regulates and limits the United States in providing for maintenance and support of its armed forces.

A. THE IMMUNITY OF THE UNITED STATES FROM STATE REGULATION ATTACHES TO THE EXTENT THAT STATE LAW ATTEMPTS DIRECTLY TO REGULATE THE UNITED STATES OR INDIRECTLY BURDENS THE PERFORMANCE OF ITS FUNCTIONS

This Court early recognized the constitutional immunity from state regulation of properties, functions, and instrumentalities of the Federal Government.[29] As an "unavoidable consequence of that supremacy which the constitution has declared" (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), this Court has consistently struck down state regulations which transgressed the Federal Government's immunity.[30] The immunity

[29] See *Osborn* v. *United States Bank*, 9 Wheat. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590–591.

[30] E. g., *Mayo* v. *United States*, 319 U. S. 441 (fertilizer distributed under federal program not subject to state inspection and stamp tax); *Arizona* v. *California*, 283 U. S. 423 (plans and specifications for federal dam not subject to approval of state engineer); *Hunt* v. *United States*, 278 U. S. 96 (federal agents in national forest and game preserve not restricted by state laws); *Johnson* v. *Maryland*, 254 U. S. 51 (driver of United States mail truck not subject to state licensing require-

is necessary "in order to maintain the essential freedom of government in performing its functions." *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149–150. It is fundamental that "[t]he United States may perform its functions without conforming to the police regulations of a State." *Arizona* v. *California*, 283 U. S. 423, 451.

Originally, the scope of intergovernmental immunity from taxation as well as regulation was very broad, on the theory that the power to tax involves the power to destroy. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. The Federal Government's immunity from state taxation was then considered to extend to income, property or transactions of persons outside the Government who dealt with or acted for it. See cases cited in *United States* v. *Allegheny County*, 322 U. S. 174, n. 1, at 176–177. But more recent decisions have sharply curtailed the breadth of the tax immunities inherent in our federal system, and have, in accord with views expressed by the Government, permitted state taxation of government contractors, government employees, and government lessees.[31] This curtailment is based on the view that an indirect, nondiscriminatory economic burden does not interfere

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ments): *Ohio* v. *Thomas*, 173 U. S. 276 (federal soldiers' home not subject to state law requiring display of placard where oleomargarine is served); *United States* v. *Snyder*, 149 U. S. 210 (federal lien enforceable regardless of state recording and time limitations).

[31] E. g., *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342.

with the United States, but is merely "the normal incident" of the coexistence of two taxing authorities in a federal system.[32]

The Court, in reformulating the doctrine of intergovernmental tax immunity, has left intact the principle that the states cannot directly regulate the Federal Government[33] nor, even by indirection, "retard, impede, burden, or in any manner control" its operations (*McCulloch* v. *Maryland*, 4 Wheat. at 436). Those who contract with the Federal Government are not immune from state regulation if the impact upon the United States of this regulation is solely economic and is merely reflected in increased costs. This limitation on the doctrine of immunity was derived from the cases sustaining non-discriminatory state taxes on federal contractors. *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495 (privilege tax); *Smith* v. *Davis*, 323 U. S. 111 (property tax on open account); *Curry* v. *United States*, 314 U. S. 14 (use tax); *Alabama* v. *King & Boozer*, 314 U. S. 1 (sales tax); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (gross receipts tax). Thus, this Court sustained the application to federal contractors of a New York safety requirement for building construction (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94) and held that Pennsylvania's minimum prices for milk controlled sales to a United States Army camp (*Penn Dairies, Inc.* v.

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[32] *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. at 487; *Helvering* v. *Producers Corp.*, 303 U. S. 376, at 386–87; *James* v. *Dravo Contracting Co.*, 302 U. S. at 156–57, 160. See *Penn Dairies* v. *Milk Control Commission*, 318 U. S. at 270–71.

[33] See cases cited in footnote 30, *supra*, p. 42.

Milk Control Commission, 318 U. S. 261). In both these cases the tax precedents were found to govern because the regulation was found to be indirect and its sole impact on the United States was a possible increased economic burden. 309 U. S. at 104; 318 U. S. at 270.[39]

A clear pattern governing the federal-state relationship has emerged. State tax or regulatory statutes whose incidence is *directly* upon the United States, its property, or its officers are invalid. Compare *Alabama* v. *King & Boozer*, 314 U. S. 1, with *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110. The states may, however, impose economic burdens upon the United States *indirectly* through non-discriminatory taxation or regulation of federal contractors. But where the burden upon the United States is not solely economic but impairs or obstructs attainment of federal objectives, state regulation is forbidden. In the broadest terms, the Court has indicated that the Federal Government's dealings with independent contractors are immune from state laws which "interfere in any substantial way with the performance of federal

[39] The opinions in *Penn Dairies* and *Stewart* cite *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525, which involved state licensing and safety requirements applied to a trucking company under contract with the United States. Appeal was dismissed for want of a substantial federal question, citing cases on the general validity of motor vehicle regulation, without regard to the instant immunity problem. 308 U. S. 525. In *Stewart*, where the Court followed *Baltimore & Annapolis*, it considered the latter case as involving safety provisions analogous to those in *Stewart* which imposed only an economic burden on the Government. 309 U. S. at 104.

functions" (*James* v. *Dravo Contracting Co.*, 302 U. S. at 157, 161), or "handicap efforts to carry out the plans of the United States" (*Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104).

B. SECTION 530 OF THE CALIFORNIA PUBLIC UTILITIES CODE IS A DIRECT REGULATION OF THE PERFORMANCE BY THE FEDERAL GOVERNMENT OF ITS CONSTITUTIONAL FUNCTIONS

In applying the principles discussed above to this case, the first question is whether the impact of the California statute is direct or indirect. If it is direct, it is unconstitutional regardless of the extent of its effect on the Government's activities. It is our position that, both in terms and in practical application, Section 530 of the California Public Utilities Code directly regulates federal activity.

The contracts for transportation regulated are contracts between the United States and intrastate carriers; the law authorizes the Public Utilities Commission to impose conditions on such contracts and forbids them to be entered into for less than the established rates unless approved by the Commission. Thus the law forbids contracts by the United States which carry out federal policy in favor of contracts which carry out state policy. This the state may not do.

The distinction between this direct regulation and the situation in which the impact of the state law is indirect is well illustrated by a comparison of the factual situation here with that dealt with in *Baltimore & Annapolis R. R. Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525, a case relied upon by

the appellant. There, the right of the state to require a certificate, pursuant to the enforcement of its highway safety regulations, from an independent contractor carrying passengers for the Federal Government was upheld. But the regulation was not on operations by the Government or its contracts, but only upon the carrier. Insofar as the requirement of the certificate affected transportation in any way, it affected the United States only through the effect of the requirement on the carriers. The operations or contracts of the United States were not involved. Similarly, in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, the application of New York safety restrictions to a contractor for the Federal Government may have had an effect on the Government, but, if so, it was indirect and occurred only as a result of the application of the regulation to the contractor. Here, on the other hand, the very nature of the contracts to be drawn up and signed by the United States is sought to be dictated by the State of California.

The application of the statute to the United States is not a matter of construction for the state courts—by the explicit terms of Section 530 of the California Public Utilities Code it is applicable to the transportation of "property at reduced rates for the United States." The California legislature consciously and purposely amended its public utility laws to bring intrastate transportation by common carriers for the United States within the jurisdiction of its Commission (App. Br. 10–14).

Moreover, the enforcement provisions of the statute are by their terms applicable to the shipper as well

as the carrier. It is not only illegal for railroads and trucks to carry property at rates below those approved by the Commission; it is also illegal for the shipper to procure, aid or abet such noncompliance (Section 2112, California Public Utilities Code). As the district court pointed out (R. 235), under that section, a federal transportation officer can be sentenced to a year in the county jail for entering into such a contract. There are few applications of a regulation more direct than this.

The appellant seeks to escape from this argument by reference to *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261, which upheld the application of a state statute fixing minimum prices for milk to contracts with the United States (App. Br. 124–130). However, in that case the Court was careful to point out that the full impact of the law fell on the milk companies, not on the Government. Chief Justice Stone stated at page 270:

> Here the state regulation imposes no prohibition on the National government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270–271. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk.

This is, of course, wholly inapplicable to this case where, as pointed out above, penalties for violation apply to the shipper as well as to the carrier. Moreover, the United States is not free in California to

contract with whomever it chooses at whatever prices it desires. All intrastate carriers are subject to the state Public Utilities Code so that the United States cannot find someone outside of California's jurisdiction to carry its property where the traffic is intrastate in nature. This differs from the milk case where it was possible for the United States to go outside the state to find a supplier.

On analysis, therefore, it appears that this case, rather than falling within the line of *Penn Dairies* and *Stewart and Co.* v. *Sadrakula*, is much closer to *Arizona* v. *California*, 283 U. S. 423, 451 (plans and specifications for federal dam not subject to approval of state engineer); *Johnson* v. *Maryland*, 254 U. S. 51 (United States employee driving mail truck not subject to state licensing requirements); and *Miller* v. *Arkansas*, 352 U. S. 187 (Government's standards for selecting contractors not subject to state regulation).

C. SECTION 530 OF THE CALIFORNIA PUBLIC UTILITIES CODE INTERFERES SO SUBSTANTIALLY WITH THE FEDERAL DEFENSE PROGRAM THAT IT IS UNCONSTITUTIONAL WHETHER THE IMPACT BE CONSIDERED DIRECT OR INDIRECT

Regardless of whether the application of the statute to federal activity be considered direct or indirect, it is nevertheless unconstitutional if it imposes a burden on the United States which is something more than increased costs. As previously noted, the trial court found that California's regulation of the intrastate transportation of property for the United States substantially interferes with the vitally im-

portant federal function of providing supplies for the armed forces.

1. First and foremost is the interference with the continued use of the "freight all kinds" (FAK) rate. Because of the nature of military operations and movements, it is frequently necessary and desirable to ship truckloads or carloads of hundreds of different items for supply of a unit or some military operation (R. 247, 452, 575). Indeed, in many instances, diverse items are grouped together in boxes or crates so as to facilitate their use under field conditions (R. 247, 563). The Government has met its peculiar transportation requirements in this field by the "freight all kinds" shipment: a single "average" rate, which will give the carrier a fair return, is negotiated for the entire truckload or carload[*] (R. 247, 462, 511).

California's restriction of this method of shipment would, we submit, seriously interfere with military transportation functions. For, with the elimination of a FAK rate, a shipment would come under the class rate structure and the entire shipment would bear the classification of the highest item in the mass of material being moved (R. 248).[**] The military

[*] A very substantial portion of the military traffic in California moves under FAK rates (R. 501, 575, 668).

[**] The PUC Minimum Rate Tariff No. 2 states that rates are "[g]overned, except as otherwise provided herein, by the Western Classification * * *"; and the latter (Western Classification 76, in Consolidated Freight Classification 21, Rule 10, Section 1) specifies that in a mixed carload, the consignor "will be charged at the straight carload rate (not mixed carload rate) applicable to the highest classed or rated article contained in the carload * * *."

officers would be required, under Defense regulations, to avoid such a costly means of transportation.[37] They would have to classify the hundreds and thousands of different items involved in the military movement, to segregate such items in accordance with published tariffs and classifications, and to rearrange the boxing or loading of such items so as to make the rail or truck shipment as economical as possible (R. 247–248, 449, 469–470).

This sorting out process would necessarily delay shipments,[38] and the required classification and segregation would place an additional work burden on shipping personnel (R. 248, 462–463; 449, 469–470, 513, 560–561). In short, elimination of the FAK rate

[37] The Armed Services Procurement provisions, 10 U. S. C. 2301, *et seq.*, generally speaking, look to Government procurement of services at the lowest cost possible. The regulations of the three Defense establishments specify the "lowest cost" standard in procuring transportation. Thus, Army Regulation 55–142, par. 2 (a), App., *infra*, p. 67, provides: "The least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation * * *." To the same effect, see Army Regulations 55–165, par. 1 (a) (1), App. *infra*, p. 66; Navy Shipping Guide, Part I, Art. 1800 (e) (4) (3), App. *infra*, pp. 70–71; Art. 1845 (2) (a) (1), App., *infra*, p. 71; Air Force Manual (AFM) 75–1, par. 30102 (a) 30107, App., *infra*, pp. 72–73.

[38] Some items, not urgently needed, might be stored until a sufficient quantity had been accumulated to make for an economical shipment (Armed Services Procurement Regulation 1.306–7, 32 C. F. R. 1.306–7; App., *infra*, p. 65; AFM 75–1, par. 30201, App., *infra*, p. 73); most frequently, after the classification and segregation, appropriate groups of items would go forward in less than truckload shipments (R. 447–448).

would not merely greatly increase Government transportation costs; it would, under the applicable regulations, handicap and slow down actual movement of military supplies and material. The urgency of such military programs as that currently involved in developing missiles will not stand such delay. We submit that a state is not empowered to deny to shipping officers of the United States choice of the most appropriate method of shipment.

The United States could not avoid this "sorting out" process by shipping diverse items in carloads and paying the class rate of the highest classified item. Controlling statutory and regulatory provisions, as well as a proper concern for economical conduct of the Government's business, foreclose this choice (R. 376, 608).

Elimination of FAK shipments would impose other burdens on Government transportation officers. The Government's bill of lading for such a shipment contains only a brief generic description of the items involved (*e. g.*, "bolts," "machinery") for identification purposes at destination (R. 533–534, 545, 764-777).[39] But under California regulation (PUC Minimum Rate Order No. 2), the Government would be required to describe completely each item for classification and rating purposes (R. 533–534, 545), with resulting

[39] Appellants argue (Br. 99–100) that the Government is required, under its standard bill of lading, to set out a complete description of the item. But the Government has not construed this requirement as applicable to FAK shipments, and Government transportation officers and employees testified that the simplified description is standard practice (R. 459–461, 467, 545).

additional expenditure of time and work effort (R. 449–450, 534). It was estimated, from a study of a representative FAK movement, that 13 additional man-hours would be required for a single shipment (R. 512–513, 533–534, 525–526, 548–549, 554).[40]

Appellant suggests (Br. 103) that under Commission regulation the Government will not be deprived of FAK rates "for all purposes." But neither the California Code nor the Commission's regulations make any provision for such shipments (R. 247), and appellant's Director of Transportation (R. 683), who gave testimony qualifying or disputing the testimony of Government witnesses as to the effect of the Commission's regulation,[41] significantly did not state that the Commission would authorize such shipments. Furthermore, the amendment to Section 530, and the Commission proceeding to bring transportation for Armed Forces of the United States under the minimum rates prescribed for permit carriers, were related to stopping or severely curbing FAK shipments. Appellant states (Br. 104) that the tes-

[40] Appellant (Br. 101) has cited three other time studies submitted by the Government as showing that the 13-hour example is atypical. But one of these studies involved only a few items already sufficiently described for classification (R. 550), and all were concerned only with classification, and apparently did not include the additional time needed to type out the complete description on the bill (R. 764–777).

[41] The Director testified that special commodity rates could expeditiously be established for the United States, that regulation of rates by the Commission would not cause delays in the movement of military traffic since the Commission could authorize rates for such traffic to be effective retroactively, and that as to traffic involving military security, he would recommend a general order exempting such traffic from regulation (R. 687–693).

timony of one of its witnesses makes it clear that "it was the serious abuse of FAK rates in California that led to the commencement of the proceeding before the Commission in 1954, and that it was the Government's desire to continue its enjoyment of these depressed rates that led to this litigation." The witness referred to testified that, while the FAK rate might be "proper to certain unusual circumstances", it is "obviously wrong", from a rate-making viewpoint and "has been abused in California" (R. 638–639). In view of the Appellant's stress that the Government's "use of FAK rates is a major evil" warranting Commission correction (App. Br. 122–123) it is clear that the California Commission would, if permitted, seriously curtail the use of these rates.

2. Frequently, military shipments between California points are of an urgent nature (R. 243, 443, 501, 533). At present, a rate similar to the commodity rate can be negotiated for urgent shipments in a matter of hours; or, if necessary, the shipment is made and the rate established retroactively (R. 247, 405–406, 597–598). But if negotiated rates are subject to Commission approval there could be material delays (R. 245–246). Thus, either shipment would be delayed until approval of the proposed commodity rate or it would be made at the much higher class rate and the United States, which has frequent need to make urgent shipments, would be discriminated against (R. 247).

Appellant's Director of Transportation testified that in his opinion the Commission could, under the Public Utilities Code, authorize retroactive rates

for Government traffic (See App. Br. 105). But assuming that appellant could, and in some instances would, approve retroactive rates, this would not solve the difficulties created by state control. It is the duty of Government transportation officers to secure the most economical method of transportation. Where a retroactive rate can be granted only with state approval, the transportation officer has no means of knowing at time of shipment whether any reduction will be approved and, if so, the amount of the approved reduction. Cost of transportation being, in these circumstances, an unknown quantity, the transportation officer is not in a position to decide whether "adequate and economical commercial transportation" is not available, thus justifying the use by the Army of its own vehicles (A. R. 57–5, para. 4 (1)), App. *infra*, p. 77, or, whether, where possible, to ship by an interstate route in order to avoid the higher charge payable for a more direct intrastate shipment (R. 386, 487).[42]

We submit that this kind of confusion and uncertainty, engendered by state regulation, is a serious interference with federal functions. This Court has said, although in a somewhat different context: "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general

[42] One Government witness, Colonel Hall, testified (R. 157): "At Sharpe General Depot I am procuring officer, and I am subject to all the procurement regulations that every other procurement officer is. Mainly, I can't spend the taxpayers' money unless I know how much I am going to spend."

authority were subject to local controls." *United States* v. *Allegheny County*, 322 U. S. 174, 183.

3. Shipments of military items of a secret nature or to installations whose locations are secret are frequently made in California (R. 242, 499, 502, 514, 561). Under the Government's present system, the rate for such a shipment is negotiated with a single representative of the several carriers, who has the highest security clearance (R. 586–587, 599–602). No other person is informed of the nature of the item or the location of the secret installation (*ibid.*).[43] But if California were to assume jurisdiction over the rates for Government shipments, it would have to obtain information concerning the nature of the item, its origin and destination, and volume of the movement, in order to determine whether the rate in question was "just and reasonable" (R. 249). In the case of the secret item, the disclosure of such information to appellant would contravene applicable defense regulations[44] and might seriously jeop-

[43] Often the secret item is deliberately misdescribed in the bill of lading accompanying the shipment; and material moving to the secret location is routed in a circuitous way so that the ultimate destination is not revealed (R. 384, 416, 450–1).

[44] See e. g., A. R. 380–55, Military Security: Safeguarding Defense Information in Movement of Persons and Things, App., *infra*, p. 69; A. R. 380–5, Military Security, Safeguarding Defense Information, App., *infra*, pp. 68–69. These regulations, which have counterparts in the Navy and Air Force regulations, forbid the unauthorized disclosure of classified information concerning military movements, and limit access to such information "to those who require it and are appropriately cleared for access to it" (A. R. 380–55, par. 8 (b) (2); see R. 419).

dize the security of the United States (R. 249, , 561, 577).[45]

Recognizing "the necessity of preserving the na- nal security" (Br. 109), appellant's chief counsel pulated at the hearing below that he would advise Commission that it has the lawful authority "to thorize any carrier to negotiate with the United ates with complete freedom concerning the trans- rtation of any property of the United States which y involve security matters, provided only that the rrier require a certificate from a responsible fed- l officer, which certificate shall be filed with the mmission, that such transportation involves secu- y matters * * *" (R. 700–701). Assuming that pellant legally could and would promulgate such a ulation, this would not obviate state interference h federal functions.

We submit that a state has no power to require a ited States officer, who under valid Federal regula- ns determines that a particular Government ship- nt should move under secrecy procedures, to file a cer- cate with the state's agency as a condition to carry- out that determination. See *Miller* v. *Arkansas*,

[45] Appellant suggests (Br. 110) that the Government could umvent its regulation by use of its own vehicles or by leas- of vehicles from commercial carriers. The Government and does use its own vehicles for many secret shipments 418; A. R. 57-5, par. 4 (1)) but at times it does not have icient facilities to carry out the secret movement (R. 419). e critical fact here is that even in the most highly sensitive as, it has been the Government's practice for years to use mmercial vehicles with adequate security safeguards (R. 418-).

States and specifically prohibiting State regulation of intrastate services to the United States, there is no inherent conflict between State rate regulation of private intrastate carriage of property of the United States and the Constitutional powers and duties of the United States referred to by the District Court. Indeed, in the absence of a showing of necessity for any such legislation in relation to the Constitutional powers and duties of the United States the Tenth Amendment to the Constitution of the United States preserves the powers of the States in this respect. Compare *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 153-156 (1944).

This Court has long recognized that State regulation of motor carriers using State highways, even though involving a contract of carriage for the United States, does not interfere with the Constitutional powers and duties of the United States so as to present any substantial federal question. That was the basis for the decision of this Court in *United States* v. *Baltimore & Annapolis Railroad Co.*, 308 U.S. 525 (1939), dismissing the appeal of the United States, for want of a substantial federal question, from the decision below in *Baltimore & Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, 4 A (2d) 734 (1939).

If there was ever any doubt of the State authority to regulate the minimum prices or rates for services or property contracted for by the United States, it was set at rest in favor of such authority by the decision of this Court in *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1943). In that case the State Commission had prescribed the minimum price of milk to be sold to the Army within the State under contract with the United States. The United States urged that

such regulation making it unlawful to contract at a price below the prescribed minimum "violates the constitutional immunity of the United States and also conflicts with Federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases." In an opinion which examined in detail the arguments of the United States this Court rejected both contentions.

There is no significance in the fact that the rate regulatory action in the *Penn Dairies* case involved the fixing of a minimum price for milk sold to the United States and here such rate regulatory action involves the fixing of a minimum rate for intrastate carrier service to the United States. Both the regulation of the minimum prices for milk and carrier service are based upon the police power of the States preserved to them by the Tenth Amendment to the Constitution of the United States. Although the Court below finds a Constitutional difference between procurement of milk for the Army and other items of property for Army use, nevertheless no such distinction was drawn by the District Court in enjoining State regulation of rates for intrastate carriage of *all* property of the United States.

In respect to furnishing transportation a carrier ordinarily bears to the United States the same relation that it does to a private person using its facilities. *St. Louis, B.&M.R. Co.* v. *United States*, 268 U.S. 169, 173 (1925). Carriers cannot, by private contracts with shippers, prevent or postpone the exertion by the State of the power to regulate the carrier's rates and practices. *Producers Transportation Co.* v. *Railroad Commission*, 251 U.S. 228, 232 (1920).

II.

No Federal Legislation Deprives the States of Authority to Regulate Intrastate Motor Carrier Rates for Service to the United States

None of the Federal statutes relied upon by the District Court show any intention of the Congress to deprive the States of their power or authority to regulate the intrastate rates or practices of motor carriers in rendering transportation service to the United States. On the contrary, if anything, they recognize such authority in the States. As pointed out above, this Court in the *Penn Dairies* case considered and rejected the argument of the United States that various Federal statutes of the time, relating to government purchasing and competitive bidding on government contracts, showed that Congress intended to supersede the normal price or rate regulatory functions of the States in connection with government contracts with private persons for goods or services. There has been no material change in Federal legislation in this respect since the decision in the *Penn Dairies* case.

The provisions of the Armed Services Procurement Act of 1947, as amended,* are not materially different from the similar statutory provisions considered by this Court in the *Penn Dairies* case (318 U.S. at pp. 271-273). As stated there such statutes "do not purport to set aside local price regulations or prohibit the States from taking punitive measures for violations of such regulations." "They are wholly consistent with the continued existence of such price regulations and

* Section 151 of Title 41, U.S.C., was repealed by the Act of Aug. 10, 1956, c. 1041, Section 53, 70 A. Stat. 641. Its provisions are now covered by Sections 2301, 2303-2305, Title 10, Armed Forces, U.S.C.

with acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where the local price regulations render it 'impracticable to secure competition' " (318 U.S. at p. 272-273). See also Senate Report No. 571, July 16, 1947 (to accompany H.R. 1366, 80th Cong., 2nd Session), 1948 U.S. Code Cong. Serv., pp. 1049-1050.

The provisions of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471, 481(a)(4)), show on their face that Congress has recognized the authority of the State regulatory commissions over rates of carriers for transportation services to the United States. They do so by providing for representation before such State agencies by the Administrator. Neither such representation nor anything in that Act purports to supersede the authority of such State agencies in fixing rates of the carriers under their jurisdiction for services to the United States. Compare *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489, 497-499 (1944).

Section 22 of the Interstate Commerce Act (49 U.S.C. 22) is relied upon heavily by the District Court as showing a legislative intent by Congress that the United States is free to contract for procurement of transportation service for shipment of government property without regard to the rate regulatory authority of the States. Section 22 of the Interstate Commerce Act is made applicable to the Motor Carrier Act (Part II of the Interstate Commerce Act) by Section 217(b) thereof (49 U.S.C. 317 (b)). But Section 202(b) of the Motor Carrier Act clearly preserves "the exclusive exercise by each State of the power of regu-

lation of intrastate commerce by motor carriers on the highways thereof." (49 U.S.C. 302 (b)). See *Eichholz* v. *Public Service Commission*, 306 U.S. 268 (1939). The Interstate Commerce Commission is specifically prohibited by Section 216(e) of that Act from regulating rates "for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or any other purpose whatever" (49 U.S.C. 316 (e), *proviso*). Thus, so far as motor carrier transportation is concerned, the Federal law in positive terms recognizes the intrastate rate regulatory authority of the States. Section 22 of the Interstate Commerce Act is neither applicable to intrastate carrier transportation nor inconsistent with such recognition of State authority. See *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U.S. 341, 345-346 (1951).

CONCLUSION

It is respectfully submitted that the States have power to regulate the minimum intrastate rates of motor carriers for the transportation of property of the United States between points within the State; and that the action and judgment of the District Court interferes with such power, is in error and in violation of the Tenth Amendment to the Constitution of the United States, and should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1957

NO. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

JOINT BRIEF OF RAILROAD COMMISSION OF TEXAS, ATTORNEY GENERAL OF TEXAS, AND TEXAS INDEPENDENT MOTOR CARRIERS, AMICI CURIAE

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352 U. S. 187, 190; *Mayo* v. *United States*, 319 U. S. 441. It cannot "lay hold of [Government servants] in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient." *Johnson* v. *Maryland*, 254 U. S. 51, 57; *Miller* v. *Arkansas*, *supra*, at 190. No matter how valid the state policy involved may be, "the federal function must be left free [from such direct state exactions]", since "[t]his freedom is inherent in sovereignty." *Mayo* v. *United States*, *supra*, at 447.[46]

In this aspect of the case, also, the appellant's reliance on *Penn Dairies* v. *Milk Control Commission*, 318 U. S. 261, 270, is wholly misplaced. The state law there involved, fixing the minimum price for sales of milk, was held to be merely an "exercise of control over the seller" from whom the Government purchased, with only an incidental economic burden passed on to the Government. Here, however, even assuming that Section 530 is administered in the manner claimed by appellant, there would be a substantial interference with the military transportation system in California: Carload shipments, which

[46] As the lower court found (R. 249-250), California's regulation would jeopardize security in still another way. In order to establish commodity rates for Government shipments, the contemplated volume of shipments as to the particular item would have to be disclosed to the Commission (and to other state regulatory agencies which might assume jurisdiction over rates for Government shipments—see note 8, p. 22, *supra*) (R. 385-6, 490). But the furnishing of such information to the several state regulatory commissions might well reveal a pattern of military movement from which enemy agents could derive vital information (R. 249-250, 385-386, 451-452).

would have gone forward in a simplified and expeditious manner, would have to be broken down and rearranged into several less-than-carload movements. There would be delays, added military personnel would be needed, and the shipping officers would find themselves in situations where they could not intelligently discharge the duties assigned them or could do so only upon the condition that a certificate be executed and transmitted to the Commission. It is well settled, under the authorities cited at the outset of this discussion, that a state cannot thus hamper the federal function.

The Constitution reflects the determination that the procurement of supplies and services for the Army is a matter of national concern, to be regulated by the representatives of all the people and not to be controlled or interfered with by single states in their local interests; it vests the power "To raise and support Armies" in Congress and not in the states (U. S. Const., Art. I, Sec. 8, cl. 12). It is no answer to say that California may exercise its retained police powers over carriers operating within its jurisdiction. Where the exercise of that police power, regardless of its immediate incidence, results in "an interference with government, or an impairment of the efficiency of its agencies in any substantial way", it is inapplicable to the United States. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 157; see also *Arizona* v. *California*, 283 U. S. 423, 451. Here, California in

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"While we believe no consideration can be given in these circumstances to the state's objective, it should be pointed out that exclusion of the Government's shipments from state regu-

its attempt to regulate the rates charged for Government shipments, has gone beyond the field of local affairs and has, in practical effect, engaged in regulation of the United States and of the support of its Armed Forces.

---

lation would not mean that abuses in federal transportation methods will go uncorrected. Army regulations implementing Department of Defense Directive 4500.9, January 6, 1956, App., *infra*, p. 74, require responsible officials, in the procurement of commercial transportation, to "be guided by and pursue policies which will not contravene the National Transportation Policy (enacted by Congress in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act) * * *" (A. R. 55–8, par. 2, App., *infra*, p. 67. That policy seeks to "* * * foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonsonable charges for transportation services, without * * * unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. * * *" A. R. 55–105, par. 4 (a) (1), App., *infra*, p. 66, specifically places the duty on transportation officers to insure that property is forwarded "by the least costly mode, having in mind * * * the national transportation policy * * *." As Mr. Justice Holmes stated in *Johnson* v. *Maryland*, *supra*, at 57, "that duty it must be presumed has been [and will be] performed." See also A. F. M. 75–1, par. 30104 (b), (c) (1), App., *infra*, p. 71.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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DECEMBER 1957.

APPENDIX

FEDERAL STATUTORY PROVISIONS

1. The pertinent Armed Services procurement provisions, 10 U. S. C. 2301 (70A Stat. 127–133), are as follows:

> § 2304. Purchases and contracts: formal advertising; exceptions
>
> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> * * * * *
>
> (2) the public exigency will not permit the delay incident to advertising;
>
> * * * * *
>
> (10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
>
> * * * * *
>
> (12) the purchase or contract is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;
>
> * * * * *
>
> § 2305. Formal advertisements for bids; time; opening; award; rejection
>
> * * * * *
>
> (b) * * * Awards shall be made with reasonable promptness by giving written notice to that responsible bidder whose bid conforms to the

invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * * *

2. The provisions authorizing the Defense heads to prescribe regulations are as follows:

10 U. S. C. 3012 (g):

> The Secretary [of the Army] may prescribe regulations to carry out his functions, powers, and duties under this title.

10 U. S. C. 6011:

> United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President.

10 U. S. C. 8012 (f):

> The Secretary [of the Air Force] may prescribe regulations to carry out his functions, powers, and duties under this title.

3. The Johnson Act, 62 Stat. 932 (28 U. S. C. 1342) provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

4. Section 22 of the Interstate Commerce Act, as amended, 71 Stat. 564, 49 U. S. C. 22, provides in part:

(1) Nothing in this part shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States * * *.

(2) All quotations or tenders of rates, fares or charges under paragraph (1) of this section for the transportation, storage, or handling of property or the transportation of persons free or at reduced rates for the United States Government, or any agency or department thereof, including quotations or tenders for retroactive application whether negotiated or renegotiated after the services have been performed, shall be in writing or confirmed in writing and a copy or copies thereof shall be submitted to the Commission by the carrier or carriers offering such tenders or quotations in the manner specified by the Commission and only upon the submittal of such a quotation or tender made pursuant to an agreement approved by the Commission under section 5a of this Act shall the provisions of paragraph (9) of said section 5a apply, but said provisions shall continue to apply as to any agreement so approved by the Commission under which any such quotation or tender (a) was made prior to the effective date of this paragraph or (b) is hereafter made and for security reasons, as hereinafter provided, is not submitted to the Commission: *Provided*, That nothing in this paragraph shall affect any liability or cause of action which may have accrued prior to the date on which this paragraph takes effect. Submittal of such quotations or tenders to the Commission shall be made concurrently with submittal to the United States Government, or any agency or department thereof, for whose account the quotations or tenders are offered or for whom the proposed services are to be rendered. Such quotations or tenders shall

be preserved by the Commission for public inspection. The provisions of this paragraph requiring submissions to the Commission shall not apply to any quotation or tender which, as indicated by the United States Government, or any agency or department thereof, to any carrier or carriers, involves information the disclosure of which would endanger the national security.

5. Section 321 (a) of the Transportation Act of 1940, 54 Stat. 954, as amended, 59 Stat. 607, 49 U. S. C. 65, provides, in part:

> (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, * * * *Provided further*, That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

FEDERAL REGULATIONS

1. The pertinent provisions of the Armed Service Procurement Regulations, 32 C. F. R. 1.108, *et seq.* (1957) are as follows:

> § 1.306–7 *Scheduling of deliveries to permit consolidation of shipments.* The accumulation of small shipments into carload or truckload lots will result in lower transportation costs. Also, the accumulation of small shipments into less than load shipments may also result in lower transportation costs. * * *

§ 1.306–9 *Rates.* Generally, carriers are required by both Federal and State laws to charge all shippers equally for like services rendered. However, when Government traffic possesses more favorable transportation characteristics (greater volume, heavier loading, less likelihood of damage, etc.) than commercial traffic between the same origins and destinations, freight rates are often lower for the Government traffic. Rate information shall be obtained from the appropriate military traffic management office.

§ 1.306–10 *Volume shipments.* Procurement involving volume shipments (as defined in Departmental instructions) shall be referred at the earliest practicable time to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and, when appropriate, for negotiation of adjusted or modified rates.

2. The pertinent Army Regulations are as follows:

(a) A. R. 55–105. *Transportation by Commercial Means; General.*

* * * * *

4. ROUTING, GENERAL—a. *General.*

(1) A transportation officer furnishing transportation will familiarize himself with traffic conditions out of his installation in order that property and passengers may be forwarded by the least costly mode, having in mind safety, expedition, equipment supply, procurement regulations, military necessity, and the national transportation policy (enacted in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act), and subject to special instructions or required approvals by the Chief of Transportation. * * *

(b) A. R. 55–142. *Routing of Domestic Freight Traffic.*

* * * * *

2. GENERAL POLICIES. a. The least costly means of transportation will be selected which will meet military requirements and still be consistent with governing procurement regulations and transportation policies as expressed by Congress, contingent upon carrier ability to provide safe, adequate, and efficient transportation. However, if a prior factual determination has been made that expedited delivery will result in greater overall economies through a reduction of intransit or stored supplies, a more costly means of transportation may be employed if necessary to effect the expedited delivery.

(e) A. R. 55–8. *General Transportation and Traffic Management Policies.*

* * * * *

2. ADHERENCE TO NATIONAL TRANSPORTATION POLICY. a. In the employment of Army transportation resources and in the procurement of commercial transportation, responsible officials in the Army Establishment will be guided by and pursue policies which will not contravene the National Transportation Policy (enacted by Congress in the Transportation Act of 1940 and set forth in the preamble to the Interstate Commerce Act) and the Declaration of Policy by Congress to the Civil Aeronautics Authority (as contained in Section 11 of the Civil Aeronautics Act of 1938). These policies are reproduced in the appendix and may be referred to by the general term "National Transportation Policy."

(d) A. R. 55–27. *Appearance Before Transportation Regulatory Bodies.*

1. PURPOSE AND SCOPE. a. These regulations implement uniform military policy regarding participation by representatives of the Depart-

ment of the Army in proceedings before transportation regulatory bodies and outline the procedure to be followed with respect to Army support of carrier applications for new or additional operating authorities. Provisions apply to proceedings involving transportation (except international air route applications) to, from, or between points in the United States or the District of Columbia.

b. The uniform military policy and the procedural principles governing actions in connection with expansion of operating authorities also apply within the Army Establishment to appearances before transportation regulatory bodies in connection with discontinuance or abandonment of operating authorities and discontinuance of transportation service by commercial carriers.

* * * * *

(e) A. R. 380–5. *Safeguarding Defense Information.*

* * * * *

6. BASIC SAFEGUARDS. Classified information must be safeguarded from compromise. This is accomplished primarily by the following:

* * * * *

b. Limiting access to those who "need-to-know."

* * * * *

40. NEED TO KNOW. a. No person is entitled to knowledge or possession of classified defense information solely by virtue of his rank, office, position, or security clearance. Such matter will be entrusted only to individuals whose official duties require knowledge or possession and who have been properly cleared. Responsibility for determining whether a person's official duties require that he have access to any item or classified defense information rests upon each individual who has possession, knowledge,

or command control of the information involved and not upon the prospective recipient. These principles are equally applicable if the prospective recipient is an organizational entity, including commands, other Federal agencies, or a foreign government.

* * * * *

(f) A. R. 380–55. *Safeguarding Defense Information in Movement of Persons and Things.*

* * * * *

5. GENERAL. a. The provisions of this section apply to the classification of movement information.

b. Movement information is normally unclassified and may only be assigned appropriate defense classifications under the provisions of sections II and III, AR 380–5, when unauthorized disclosure COULD RESULT IN EXCEPTIONALLY GRAVE OR SERIOUS DAMAGE TO THE NATION OR COULD BE PREJUDICIAL TO THE DEFENSE INTERESTS OF THE NATION.

c. Movement information including, but not limited to, any of the following elements will be classified CONFIDENTIAL or higher when the classification criteria of *b* above, require—

(1) Information within the scope of paragraphs 14, 28, and 29a, AR 380–5.

(2) Missions of individuals, groups, units, organizations.

(3) Locations of persons, places, or things.

(4) Actual or estimated dates or times of arrival or departure.

(5) Personnel strengths and identification of persons, groups, units, organizations, or things.

(6) Routings of persons or things.

* * * * *

(g) Army Procurement Procedure 30-204.5, Utility Service Contracts, March 12, 1957.

a. ARMY POWER PROCUREMENT OFFICER. The Chief of Engineers, acting for the Secretary of the Army, is the Department of the Army Power Procurement Officer. The Army Power Procurement Officer is responsible for the administration of the purchase and sale of utilities services, and for policies, engineering, rates and legal sufficiency in connection with all utilities services transactions and contracts relating thereto in which the Department of the Army has a monetary interest. * * *

3. The pertinent Navy regulations are as follows:

(a) Navy Shipping Guide, Part I, art. 1800 (d) (3) (20):

(d) DELEGATION OF CONTROL TO NAVY CENTRAL FREIGHT CONTROL OFFICES.—

* * * * *

(3) OTHER DUTIES.—Other duties of the Navy central freight control offices are to:

* * * * *

20. advise the Bureau of Supplies and Accounts regarding impending freight movements when applicable freight rates appear excessive and, in the opinion of the Navy central freight control office, may be negotiated for more equitable rates.

(b) Navy Shipping Guide, Part I, art. 1800 (e) (4) (3):

(e) DESIGNATION AND RESPONSIBILITY OF SHIPPING OFFICERS.—

* * * * *

(4) RESPONSIBILITIES.—Shipping officers are responsible for the following:

* * * * *

3. to exercise sound traffic management procedures and to forward all shipments at the most economical over-all cost to the Government consistent with delivery requirements; * * *.

(c) Navy Shipping Guide, Part I, art. 1845 (2) (a) (1):

2. SELECTION OF THE MEANS OF TRANSPORTATION.

(a) POLICY.—

(1) *General.*—The basic policy in selecting the means of transportation and the choice of method, that is, rail freight, rail express, water carriers, motor carriers, parcel post, air carriers, etc., is to employ that which will effect delivery of the material at final destination on or before the required time at the lowest over-all total cost to the Government. * * *

(d) Bureau of Yards and Docks Manual, Ch. 11, ¶11B1.05:

It is the policy of the Bureau of Yards and Docks to provide utility services at activities of the Shore Establishment under terms and conditions that will achieve optimum economy for the Government, and are consistent with requirements, efficiency of operation, adequacy and reliability of service, health, and sanitation.

4. The pertinent Air Force regulations, found in AFM 75–1, Part three, Transportation Policies and Selection of Mode of Transportation, are as follows:

(a) AFM 75–1, Ch. 1 (General), ¶30101 (b), (c) (1):

§ 30101. GENERAL TRANSPORTATION AND TRAFFIC MANAGEMENT POLICIES.—

* * * * *

b. *General.* In the employment of its own transportation resources and in the procurement of commercial transportation, the Depart-

ment of the Air Force will be guided by and pursue policies which will not contravene the National Transportation Policy enacted by Congress in the Transportation Act of 1940 and the Declaration of Policy by Congress to the Civil Aeronautics Authority, as contained in Section 1 of the Civil Aeronautics Act of 1938. These policies are cited in Appendices H and I for the guidance of all in connection with any reference thereto in Department of the Air Force transportation and traffic management procedures.

c. *Policies:*

(1) The economic resources of the Department of the Air Force inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry.

* * * * *

(b) AFM 75–1, Ch. 1, ¶30102:

§ 30102. SELECTION OF MODE OF TRANSPORTATION.—

Selecting the mode of transportation to be used in shipping property and routing within the mode selected is a phase of traffic management which must be considered frequently in daily operations. In determining the mode of transportation to be utilized, the following factors will be considered:

a. The least costly means will be selected, having in mind safety, expedition, equipment supply, procurement regulations and security considerations.

b. Consideration will be given to the possibility of rate negotiations (tariffs, schedules, or Section 22 agreements). Before this can be done it is necessary to have certain information available.

(1) What is to be shipped and how it should be described on the bill of lading.

(2) Consignee and destination.

(3) Overall cost of shipping via different modes.

(4) Types of service afforded by various modes of transportation.

(5) Need for expedited service; routes specified in tariffs; clearances; and the type of service afforded by specific carriers within a mode.

(6) Security classification.

(c) AFM 75–1, Ch. 1, ¶30107:

30107. TRANSPORTATION AND INCIDENTAL COSTS—

In selecting the means of transportation and the choice of method, that is, rail freight, rail express, water carrier, motor carrier, parcel post, air carrier, etc., it is basic policy to employ that which will effect delivery at final destination on or before the required time at the lowest overall total cost to the Government. * * *

(d) AFM 75–1, Ch. 2 (Consolidating Shipments at the Military Installation), ¶30201:

30201. General. * * * To obtain lower transportation costs or more expeditious service, small-lot shipments may be held for as many as five workdays (or longer if advantageous) for consolidation with other shipments to the same destination, when there is a reasonable expectancy of accumulating truckload, carload, or other volume lots. * * *

(e) AFM 75–1, Ch. 5 (Negotiations with Commercial Carriers * * *), ¶80501 (b):

80501. General

* * * * *

b. *Basis for Negotiating Adjustments to Rates, Charges or Governing Rules.* Negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules will be undertaken only after a determination has been made as to the unreasonableness, unjustness or otherwise apparent unlawfulness of effective rates, charges or rules. Substantive and relative data will be prepared and offered in justification thereof. Negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other. In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, no attempt will be made to prescribe which of the authorized methods will be used.

* * * * *

5. The pertinent Department of Defense Directives are:

Department of Defense Directive No. 4500.9, January 6, 1956:

* * * * *

SUBJECT General Transportation and Traffic Management Policies

* * * * *

II. GENERAL

In the employment of its own transportation resources and in the procurement of commercial transportation, the Department of Defense will be guided by and pursue policies which will not contravene the National Transportation Policy enacted by Congress in the Transportation Act of 1940 and the Declaration of Policy by Congress to the Civil Aeronautics Authority, as contained in Section II of the Civil Aeronautics Act of 1938. These policies are cited in the attached enclosure for the guidance of all in connection with any reference thereto

in Department of Defense transportation and traffic management policies.

III. POLICIES

A. The economic resources of the Department of Defense inherent in its large procurement of commercial transportation will not be employed in such a manner as will adversely affect the economic well-being of the commercial transportation industry.

* * * * *

Department of Defense Instruction No. 4520.3, February 2, 1956:

SUBJECT Transportation Freight Rate Negotiation and Litigation (Domestic)

* * * * *

II. POLICIES

A. *Bases for Negotiating Adjustments to Rates, Charges or Governing Rules.*

Negotiations for adjustments or modifications of commercial carriers' rates, charges or governing rules will be undertaken only after a determination has been made as to the unreasonableness, unjustness or *otherwise apparent* unlawfulness of effective rates, charges or rules. Substantive and relative data will be prepared and offered in justification thereof. Negotiations will not be conducted by attempting to play one carrier or mode of transportation against the other. In instances where carriers have the option of providing rates in some manner other than by the usual tariff publication, the military departments will not prescribe which of the authorized methods will be used.

* * * * *

CALIFORNIA STATUTORY PROVISIONS

1. Section 526 of the California Code of Civil Procedure provides in part:

* * * * *

An injunction cannot be granted:

* * * * *

4. To prevent the execution of a public statute by officers of the law for the public benefit;

* * * * *

2. Section 1759 of the California Public Utilities Code, California Statutes 1951; ch. 714, § 1759, provides:

> § 1759. Jurisdiction of courts to review orders or decisions of commission. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

3. Section 2107 of the California Utilities Code, provides:

> § 2107. Penalty for offenses not otherwise provided. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense.

Motor Transport Service

* * * * *

4. Basic policies. The following basic policies are set forth to guide commanders in their responsibilities for furnishing economical and efficient official motor transportation service in support of Department of the Army activities in the continental United States.

* * * * *

l. Except in cases of military necessity, such as emergencies, maneuvers, training activities, or operations requiring a high degree of security, or as otherwise authorized by specific Department of the Army directives, general transport administrative vehicles will not be employed when adequate and economical commercial transportation facilities are available.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF HUGHES TRANSPORTATION, INC., AMICUS CURIAE

DARYAL A. MYSE
1411 Pennsylvania Ave., N. W.
Washington 4, D. C.

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BRIEF OF HUGHES TRANSPORTATION, INC., AMICUS CURIAE

STATEMENT OF INTEREST

Hughes Transportation, Inc., *amicus curiae*, is a carrier of explosives by motor vehicle. For a long time its principal activity has involved the transportation of military explosives for the United States, acting through the Department of the Army. A substantial

part of that activity has occurred on the public roads and highways in intrastate commerce between points within the Commonwealth of Kentucky. Such activity has at all times been subject to rate regulation by the Kentucky Department of Motor Transportation, an administrative agency of the Commonwealth of Kentucky.

Hughes Transportation, Inc. is Plaintiff in two suits against the United States pending before the United States Court of Claims (Case Nos. 525-52 and 208-54). The claims against the United States in those suits arise out of a dispute between the parties as to the lawful rates applicable to the shipments of explosives carried by Hughes between points within Kentucky. Hughes and the Commonwealth of Kentucky, an intervenor in such suits, contend in the Court of Claims cases that the lowest lawful rates applicable are those prescribed as minima for common carriers by motor vehicle by the Kentucky Department of Motor Transportation. The United States contends in such cases that the Commonwealth of Kentucky cannot constitutionally prescribe rates for such intrastate service to the United States at levels higher than rates agreed upon between the carrier and the United States.

In the course of the pending cases before the Court of Claims that Court decided, on motions by both parties for summary judgment, that the Kentucky authorities had authority to regulate and prescribe the Hughes rates for intrastate service to the United States. *Hughes Transportation, Inc.* v. *United States*, Ct. of Cl. No. 525-52, 121 F. Supp. 212 (1954). Further proceedings in the Court of Claims have been postponed pending decision by this Court in the instant case.

As an *amicus curiae* the interest of Hughes is confined to the question presented by the appellant California Commission as the "Ultimate Question", namely:

> Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

Both parties have consented to the filing of this Brief as an *Amicus Curiae*. It is accordingly filed pursuant to rule 42(2) in support of the Appellant, Public Utilities Commission of the State of California.

SUMMARY OF ARGUMENT

I

The District Court's decision against the power of the State to regulate rates for intrastate transportation service to the United States is not based on any applicable prohibitory Constitutional or Federal statutory provisions. The Tenth Amendment preserves to the States the power of regulation of intrastate transportation services; and in the absence of appropriate specific Federal legislation there is no inherent conflict between such State rate regulation of intrastate services to the United States and the Constitutional powers and duties of the United States.

This Court has recognized that State regulation of intrastate motor carrjers rendering service to the United States does not interfere with the Federal Constitutional powers and duties. This Court has con-

sidered and rejected the arguments of the United States that State regulation of prices or rates for property or services to the United States violates any Constitutional immunity of the United States or conflicts with Federal procurement legislation. The relation between the United States as a shipper and a carrier ordinarily is the same as the relationship between private shippers and a carrier. Contracts between shippers and carrier cannot prevent the exercise of State regulatory authority.

II

Neither the Armed Services Procurement Act of 1947 nor the Federal Property and Administrative Services Act of 1949, purport to set aside or prohibit State regulation of prices or rates for property or services to the United States. They are consistent with the continued existence of such State regulation. The Federal Property and Administrative Services Act shows recognition by Congress of the authority of the States in this respect.

Section 22 of the Interstate Commerce Act is not applicable to intrastate motor carrier transportation. The express terms of the Motor Carrier Act preserve the intrastate regulatory authority of the States, and the Interstate Commerce Commission is specifically prohibited from regulating rates for intrastate motor carrier transportation.

ARGUMENT

I.

The States Have Power to Regulate Rates for Intrastate Motor Carrier Service to the United States

The District Court's decision below contains a lengthy recital of arguments and statements by military officers of the United States with respect to anticipated difficulties they expect from application of the State regulatory laws to intrastate transportation by carriers of property of the United States. But such decision contains little or no analysis of the basis for the District Court's action in holding such regulatory laws and the State action thereunder void as contravening the provisions of the Constitution of the United States. It is clear that the District Court's decision against such power of the State is based principally upon the bare conclusion that such regulation will interfere with the Constitutional powers of the United States to provide for an adequate military establishment. References by the District Court to certain Federal statutes in an attempt to support its conclusion on the constitutional question, are clear misapplications of such statutes to the intrastate service involved.

The striking down of State legislation and rate regulatory action applicable to intrastate carriers requires and merits something more than a mere general reference to the Constitutional powers of the United States. The fact that the services by the carriers may involve the property of the United States is not a significant Constitutional difference requiring by itself the prohibition of State rate regulatory action applicable to the carriers under such circumstances. In the absence of appropriate Federal legislation, implementing the Constitutional powers and duties of the United

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

JOINT BRIEF OF RAILROAD COMMISSION OF TEXAS, ATTORNEY GENERAL OF TEXAS, AND TEXAS INDEPENDENT MOTOR CARRIERS, AMICI CURIAE

STATEMENT OF INTEREST

Each of the parties to this brief is a co-petitioner before the Supreme Court of Texas in a cause there pending which involves the same constitutional issue presented by appellant as the "Ultimate Question" in this case, namely,

> "Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?"

(The opinion of the District Court in the instant case is published as *United States v. Public Utilities Commission*, 141 F. Supp. 168 (N.D. Cal. 1956).)

The Railroad Commission of Texas is a department of government of the State of Texas which, under the Texas Constitution and statutes, exercises broad authority to regulate rates and fares of Texas intrastate common carriers of property and passengers by rail and motor. Tex. Const. Ann. (Vernon 1955) Art. X, Sec. 2, Art. XVI, Sec. 30; Tex. Civ. Stat. Ann. (Vernon 1926) Arts. 6445, 6448, 6452, 6453, 6474(5), (Vernon 1945) Art. 4008, (Vernon 1953) Arts. 911b, 911a.*

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* All constitutional citations are to the Texas Constitution of 1876. All statutory references are according to the latest official revision of 1925. Since the State of Texas makes no current official publication either of the Constitution or of the Revised Statutes of 1925, references herein will be restricted to the most current unofficial publication. In every instance appropriate citation to official proclamations and official session laws are given in the unofficial publication referred to. The Railroad Commission's rate-making jurisdiction over intrastate

The Attorney General of Texas is the chief law officer of the State of Texas. By constitutional and statutory direction he is charged with the general responsibility of advising all State agencies and officers as well as representing them in civil litigation; the Attorney General is further charged with numerous specific law enforcement duties, including enforcement of laws regulating common carriers and common carrier rates, some of which duties he exercises only as legal counsel for the Railroad Commission and others of which he exercises independently. Tex. Const. Ann. (Vernon 1955). Art. IV, Sec. 22. *Compare* Tex. Civ. Stat. Ann. (Vernon 1926) Art. 6519, (Vernon 1945) Art. 4014, Tex. Pen. Code Ann. (Vernon 1953) Art. 1690a(b)(c) *with* Tex. Civ. Stat. Ann. (Vernon 1926) Arts. 6285, 6507, Tex. Pen. Code Ann. (Vernon 1953) Art. 1690b(b)(c)(h).

The motor carrier parties hereto, referred to collectively as "Texas Independent Motor Carriers,"* constitute a group of 57 motor common carriers each of which operates in intrastate commerce in Texas independent of railroad ownership and control. Each of these motor carriers operates between points in Texas under one or more certificates of public convenience and necessity issued by the Railroad Commission of Texas authorizing service either as a regular

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* The names of such carriers are listed in Appendix A.

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rail carriers has existed continuously since 1891, and its rate-making jurisdiction over intrastate motor carriers of property and of passengers has been in effect since 1929 and 1927, respectively.

route common carrier of general commodities or as an irregular route specialized motor carrier of liquids in bulk, automotive vehicles, household goods, or other commodities requiring special equipment for their loading, unloading and transportation over the highways. Many additional motor carriers operate in Texas under similar authority from the Railroad Commission, but the 57 Texas Independent Motor Carriers who are parties to this brief are the Texas motor carriers who have regularly competed, or who have attempted to compete, with Texas common carriers by railroad in rendering intrastate common carrier service in Texas for agencies of the United States.

For many years prior to 1938 the Railroad Commission of Texas prescribed and regulated rates for general application by Texas intrastate common carriers, rail and motor, irrespective of whether or not the carrier service was performed for agencies of the United States or for some other member of the shipping and receiving public. However, by a series of three opinions, the first of which was rendered in 1938, the Attorney General of Texas advised the Railroad Commission that the Railroad Commission's rate-making power could not be constitutionally construed to apply to intrastate common carrier service contracted for by agencies of the United States because, in the opinion of the Attorney General, intrastate common carriers rendering service under contracts with agencies of the United States rendered such service under an implied constitutional immunity from local rate regulation and also because, in the opinion of the Attorney General, assertion of state rate-mak-

ing jurisdiction over such contracts would conflict with federal procurement legislation.

On August 10, 1955, the Attorney General of Texas overruled his prior opinions and advised the Railroad Commission that the Texas statutes did confer authority upon that agency to regulate rates of carrier's moving traffic for agencies of the United States in Texas intrastate commerce and that the Texas statutes, so construed, were constitutional. On August 29, 1955, the Railroad Commission notified all railroads, motor carriers, express companies, and motor bus companies of the Attorney General's ruling and advised carriers who had done so to discontinue assessing and collecting rates different from those prescribed by the Railroad Commission. Thereafter, The Texas and Pacific Railway Company and 12 other intrastate rail carriers filed a declaratory judgment action in the 126th District Court of Travis County, Texas, against the Railroad Commission and the Attorney General of Texas. The United States intervened in support of the plaintiff railroads, and the Texas Independent Motor Carriers and some other Texas intrastate motor carriers intervened in support of the position of the Railroad Commission and the Attorney General.

Trial resulted in a broad declaration of law favorable to plaintiffs which is quoted and affirmed in the opinion of the intermediate Texas Court of Civil Appeals. *Railroad Commission v. United States*, 290 S.W. 2d 699 (Austin Civ. App. 1956, error granted). Both of the lower Texas courts grounded their declara-

tion on an interpretation of Texas statutes denying the authority of the Railroad Commission to regulate rates of common carriers who contract to serve agencies of the United States in Texas intrastate commerce.

By joint application for writ of error to the Supreme Court of Texas in its Docket No. A-5932, the Railroad Commission, the Attorney General and the Texas Independent Motor Carriers presented both the local law issue and the underlying constitutional issue by points of error in the following terms:

POINT I

The Court of Civil Appeals erred in holding that the statutes of the State of Texas do not authorize regulation of rates and fares contracted for and charged by common carriers in Texas for intrastate for-hire transportation service when such service is purchased by agencies of the United States.

POINT II

The Court of Civil Appeals erred in affirming the judgment of the trial court that "existing Federal Law" compels a construction of the statutes of Texas contrary to the plain meaning and declared purposes of said statutes because neither the Federal Constitution nor any Federal statute or discernible congressional policy prohibits regulation by the Railroad Commission of Texas of rates and fares contracted for and charged by common

carriers in Texas for intrastate for-hire transportation service when such service is purchased by agencies of the United States.

The United States and its co-respondent railroads replied to such application for writ of error, relying upon the same authorities and arguments concerning constitutionality that are advanced in the instant case. On November 7, 1956, the Supreme Court of Texas granted writ of error on both points presented in the application, thereby indicating its tentative opinion that the lower Texas courts had erred and that their judgments should be reversed. See Tex. Rules Civ. Pro., 483, 500; *Railroad Commission* v. *Jackson*, Tex. , 299 S.W. 2d 266 (1957). With the concurrence of all parties, further proceedings in the Supreme Court of Texas have been postponed pending this Court's decision in the instant appeal.

This brief is submitted in support of appellant, Public Utilities Commission of the State of California. On behalf of the Railroad Commission of Texas and the Attorney General of Texas it is filed pursuant to Rule 42(4); and, consent having been given by both parties to the appeal, it is filed on behalf of the Texas Independent Motor Carriers pursuant to Rule 42(2).

SUMMARY OF ARGUMENT

I

The judgment of the District Court, in holding that intrastate common carriers serving the military and

civil agencies of the Federal Government are immune by constitutional implication from state rate regulation, fails to recognize the fundamental distinction between the immune status of federal officers and federal agencies, on the one hand, and, on the other, the non-immune status of private contractors.

The District Court's wholehearted acceptance of the Government's allegations of impairment of national security and impairment of prompt service, as well as increased costs, which might result from intrastate rate regulation, is necessarily based on the wholly unfounded premise that state regulatory authorities are less to be trusted with classified information, and have less ability and motivation to devise safe, fast and flexible procedures, than various private individuals employed by the common carriers now favored with the bulk of Government traffic.

Until Congress provides otherwise, burdens on the Federal Government growing out of non-discriminatory intrastate common carrier rate regulation here challenged (as well as unchallenged burdens on the Federal Government growing out of non-discriminatory state regulation of carriers concerning certificates of convenience and necessity, safety of operations, etc.) are to be regarded as normal incidents of the federal system.

II

No Congressional act or policy precludes state regulation. The Armed Services Procurement Act of

1947, the Federal Property and Administrative Services Act of 1949, and the regulations promulgated thereunder by the Department of Defense and the General Services Administration do not prohibit state regulation but expressly recognize and accept local price regulation for local services. Other acts of Congress show that except where otherwise specifically provided Congress intends that federal agencies, as shippers, should pay the full commercial rate for common carrier service, and that Congress has followed a policy of recognition and respect for state and local rate regulation of common carriers.

ARGUMENT

I

NO EXPRESS OR IMPLIED CONSTITUTIONAL IMMUNITY

By its opinion, findings and conclusions the District Court takes the position that there exists an implied immunity from state regulation in favor of common carriers engaged in rendering intrastate transportation service for the military agencies of the United States, and that such immunity is to be implied from the terms of the Constitution itself which relate to national defense (Art. I, Sec. 8, Cls. 11, 12, 13, 16 and 17, and Art. IV, Sec. 3, Cl. 2). The District Court's judgment, however, enjoins the Commission generally from taking "any action" which would interfere with existing special arrangements with re-

spect to "rates for the transportation of property of the United States." The District Court's holding as to intrastate military traffic, and its further holding, if it be a holding, with respect to intrastate traffic handled for non-military agencies, can be rationally explained on but one basis, namely, that the District Court accepted without question plaintiff's basic theory that common carriers under contract with agencies of the United States are clothed with the constitutional immunities of the federal officer or agency with whom they contract.

In any event, the District Court failed to recognize the clear constitutional distinction between state regulation of local contractors who sell services or supplies to Government agencies on the one hand, and, on the other, attempted direct state regulation of governmental activities of officers, agencies and instrumentalities of the United States. The distinction is fundamental to a proper decision in this case, and the District Court's failure to properly classify the nature of the regulation imposed under Section 530, California Public Utilities Code, has caused rendition of an erroneous judgment that the Constitution itself makes invalid and void any local rate regulation of common carriers who contract to furnish intrastate carrier service for agencies of the United States. *Compare United States v. Baltimore & A.R.R.*, 308 U.S. 525 (1939), *Alabama v. King & Boozer*, 314 U.S. 1 (1941), *Penn Dairies, Inc. v. Milk Control Commission*, 318 U.S. 261 (1943), *with McCulloch v. Maryland*, 4 Wheat, 316 (1819), *Johnson v. Maryland*, 254 U.S. 51 (1920).

The District Court's error of analysis is demonstrated by its consideration of the evidence as if Section 530 were directed against, and designed to directly regulate, contracting officers of the Federal Government, and only incidentally to regulate intrastate rates of common carriers (rather than the converse which plainly appears from the statute). The District Court's error of analysis is further demonstrated by its reliance upon cases concerning the subject of "undue burdens" on interstate commerce, such as *Morgan v. Virginia*, 328 U.S. 373 (1946), as furnishing standards defining the permissible extent to which states may properly regulate local activities, such as regulation of intrastate common carriage, which may indirectly affect federal officers and agencies in the performance of their duties. See *Johnson v. Maryland*, *supra*.

The Court's decisions in *United States v. Baltimore & A.R.R.*, *supra*, and *Penn Dairies, Inc. v. Milk Control Commission*, *supra*, clearly establish that neither the civil nor the war powers of the Constitution of themselves immunize Government transportation contractors from non-discriminatory local regulation traditionally exercised by the states over common carriers. Even the dissent in the *Penn Dairies* case accords with this view since the position of the dissenting justices was based not on the terms of the Constitution alone but on the Supremacy Clause and certain federal statutes and regulations construed by the dissenting justices to be inconsistent with the application to Government contractors of Pennsylvania's milk price regulation.

The reasons given by the District Court for refusing to apply the principles underlying this Court's decisions in the *Penn Dairies* and *Baltimore & A.R.R.* cases are without substance. With respect to alleged impairment of prompt service from "delays and increased administrative burdens," analysis of the evidence will convince the Court that these matters resolve themselves down to little more than cost factors. Further with respect to the District Court's reasoning that intrastate rate regulation of common carriers serving the Government might impair the national security and result in delays in transit, the Court will observe that such reasoning is necessarily based on two assumptions of the District Court which the parties hereto most earnestly challenge, namely: (1) that the responsible personnel of state regulatory authorities, who would "need to know" certain facts about the traffic to pass upon the reasonableness of a proposed rate, are less to be trusted with classified information than are various private individuals employed by the common carriers now moving such traffic who are necessarily required to make similar determinations; and (2) that state regulatory authorities lack the ability and motivation to work out safe, fast and flexible rate-making procedures for Government traffic moving by intrastate common carriers.

Finally, with regard to the District Court's attempted distinction concerning the direct or indirect nature of the regulation involved, the court will observe that the California regulatory system like many other state regulatory systems does include a general penal provision designed to require users of the regulated

transportation system, as well as carriers, to comply with the act and with lawful administrative rules and regulations thereunder.*

But such penal provisions do not even incidentally affect the manner in which the Government's property shall be moved *unless* the Government chooses to employ local common carriers. The United States may still transport its own property in any manner it sees fit without incurring any of the incidental burdens involved in the use of carriers for hire.

So long as it remains the policy of Congress that federal agencies, military and civil, shall primarily rely for intrastate transportation service not on their own transportation facilities but on the common carrier systems maintained and traditionally regulated in accordance with the transportation policies of the several states, and so long as Congress has not exercised its undoubted power to authorize federal agencies to contract for local transportation service without complying with local transportation regulations otherwise applicable in the state where the service is

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* See for example, Tex. Pen. Code Ann. (Vernon 1953) Art. 1690b(a)(b)(g)(h) and (i) which have been recognized by this Court as being part of a state transportation regulatory system designed to protect the integrity of common carrier rates and "to prevent through regulation unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness." *Steele v. General Mills, Inc.*, 329 U.S. 433, 440 (1947).

purchased (see Part II), it must be held that burdens on the national Government growing out of non-discriminatory intrastate common carrier rate regulation here challenged (as well as unchallenged burdens on the United States resulting from other non-discriminatory state regulation of local carriers concerning certificates and permits, safety of operations, etc.*) are to be regarded as normal incidents of the federal system.

II

NO CONGRESSIONAL ACT OR POLICY REQUIRES IMMUNITY

In 1943 this Court held in the *Penn Dairies* case that the existing military procurement statutes and regulations (318 U.S. at 272-273):

> "do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it 'impracticable to secure competition'."

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* *Cf. U.S.A.C. Transport, Inc. v. United States*, 203 F.2d 878 (10th Cir. 1952), *cert. denied*, 345 U.S. 997.

However, an entirely contrary interpretation of such statutes was expressed by the dissenting justices who were of the opinion that the "impracticable to secure competition" exception had no application and that the general provision for competitive bidding required that state-fixed prices otherwise applicable to local contractors be ignored in all instances involving contracts with the Army. Since the date of the *Penn Dairies* decision, and presumably with knowledge thereof, federal procurement legislation for the military and civil agencies and the administrative regulations thereunder have been rewritten so as not only to preserve in the same form and language the basic system considered by the Court in the *Penn Dairies* case but also to clarify beyond any reasonable doubt that Congress did not intend to override and set aside local price-fixing regulations.

The Armed Forces Procurement Act of 1947* undertook to "make uniform all the laws and rules covering purchase procedure for the armed services." Sen. Rep. No. 571, 80th Cong. 2nd Sess., U.S. Code Cong. Serv. (1948) 1049. Section 151 did not require competitive bids if "for supplies or services for which it is impractical to secure competition," or if "otherwise authorized by law." Senate Committee Report No. 571, *supra*, contains a full statement about the excep-

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* Act of Feb. 19, 1948, 62 Stat. 21, 41 U.S.C., 1952 ed., §§151-161. This Act, as amended in various immaterial respects, has been transferred to Title 10 of the Code by the Armed Forces Act of 1956. Act of Aug. 10, 1956, 70 Stat. 641, 10 U.S.C., 1952 ed., Supp. IV, §§ 2301-2314.

tional categories wherein negotiation was authorized and gives the following as illustrative of negotiation authority "otherwise authorized by law" (U.S. Code Cong. Serv. (1948) 1062):

> "Act of September 18, 1940 (54 Stat. 954, as amended by 59 Stat. 609; 49 U.S.C. 65), among other things this Act authorizes the procurement of transportation services without advertising *when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.*" (Emphasis added)

The statute referred to in the Senate Report is the same act which, reversing pre-existing federal transportation policy, also made the full commercial rates, fares and charges applicable to common carrier transportation of persons or property of the United States, including transportation by carriers engaged in interstate and foreign commerce (subject, of course, to valid reduced rates being negotiated by such interstate carriers under Sections 1(7) and 22 of the Interstate Commerce Act). See *United States v. Powell*, 330 U.S. 238, 241-242 (1947).

Under authority of the Armed Forces Procurement Act of 1947 administrative regulations were first published individually by the Army, Navy and Air Force; thereafter uniform regulations applicable to all branches were published by the General Services Administration and, after creation of the Department of Defense, by the Secretary of Defense. 32 C.F.R.

Ch. IV A, Part 400; 32 C.F.R. Subtitle A (effective Dec. 31, 1954). All of these regulations were substantially similar in their definition of conditions authorizing negotiation rather than competitive bidding within the meaning of the statutory authority relating to "supplies or services for which it is impractical to secure competition." The regulations promulgated by the Secretary of Defense are typical and include the following authorizations for negotiated contracts (32 C.F.R. Sec. 3.210):

> "(e) Where the contemplated procurement is for electric power or energy, gas (natural or manufactured), water, or other utility services;"
>
> "(j) When the contemplated procurement is for stevedoring, terminal, warehousing, or switching services, and when either the rates are established by law or regulation or the rates are so numerous or complex that it is impractical to set them forth in the formal specification for a formal solicitation of bids;"
>
> "(k) When the contemplated procurement is for commercial or air transportation, including time charters, space charters and voyage charters over trade routes not covered by common carriers (as to which, negotiation is authorized under the provisions of § 3.217 to 3.217-2 and Section 321 of Part III of the Interstate Commerce Act of September 18, 1940, 49 U.S. Code 65), and including services for the operation of Government-owned vehicles."

The Federal Property and Administrative Services Act of 1949* is for the most part concerned with procurement of services and supplies for the non-military agencies. Its terms with respect to competitive bidding and negotiation of contracts are for all practical purposes identical with the terms of the Armed Forces Procurement Act. 41 U.S.C., 1952 ed., § 252(c). Most pertinent for present purposes, however, is a provision of the 1949 Act applicable to both civil and military agencies whereby Congress authorized the Administrator of the General Services Administration "with respect to transportation and other public utility services" to represent all executive agencies (40 U.S.C., 1952 ed., § 481(a)(4):

> ". . . in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal *and State* regulatory bodies; provided, that the Secretary of Defense may from time to time, and unless the president shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this Subsection whenever he determines such exemption to be in the best interests of national security." (Emphasis added)

Effective October 2, 1954, the Secretary of Defense exercised the proviso power referred to,** and since

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* Act of June 30, 1949, 63 Stat. 378, 41 U.S.C., 1952 ed., § 251 et seq., 40 U.S.C., 1952 ed., § 471 et seq.

** 19 Fed. Reg. 6611 (Oct. 14, 1954)

that time the Secretary of Defense, or his representative, rather than the Administrator of the General Services Administration, has represented the Department of Defense in countless rate-making and other administrative proceedings before federal and state regulatory bodies as evidenced by "delegations of authority to represent" published in the Federal Register. In fact, the Secretary of Defense by appropriate delegation of authority from the Administrator of the General Services Administration often represents civil as well as military agencies. *E.g.*, 20 Fed. Reg. 3240 (May 12, 1955).

Thus, the language and history of existing procurement legislation as well as the administrative regulations published by those directly charged with execution of such laws are entirely consistent with state regulation of rates of intrastate common carriers who contract to serve both military and civil agencies of the United States. Moreover, such a construction of existing procurement legislation is, while the District Court's interpretation is not, compatible with modern Congressional policies that have made the United States as a user of common carrier services subject to payment of the full commercial rate, including services by interstate common carriers when not rendered under a specific free or reduced rate provision of the Interstate Commerce Act. *See United States v. Powell, supra; Baggett Transportation Co.*

— *Petition For Exemption — Transportation For U.S. Government*, No. MC-C-1419, I.C.C. Div. 2, 9 Fed. Car. Cas. 742 (C.C.H. 1953). Likewise, such a construction of existing procurement legislation is, while the District Court's interpretation is not, compatible with the recognition and respect shown by Congress for state and local rate regulation of common carriers even while exercising its war powers during time of war. See Emergency Price Control Act of 1942 § 302(c), 50 U.S.C.A. Appendix § 942(c) (" . . . Provided, that nothing in this Act shall be construed to authorize the regulation of . . . (2) rates charged by any common carrier or other public utility . . .); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 149-152 (1943).

Had Congress intended that contracts for local transportation services for agencies of the United States be exempt from state rate regulation, "it would unquestionably have expressed such intention in language whose meaning would be clear." See *Reagan v. Mercantile Trust Co.*, 154 U.S. 413, 417 (1894). The District Court erred in holding otherwise.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, J. W. Wheeler and Phillip Robinson, attorneys for the Railroad Commission and Attorney General of Texas and the Texas Independent Motor Carriers, respectively, amici curiae herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on this ..... day of October, 1957, we served copies of this brief on The Solicitor General, the attorneys who represented the United States in the District Court, and the appellant by mailing the same, properly addressed, air mail postage prepaid.

J. W. WHEELER

PHILLIP ROBINSON

APPENDIX A

NAMES OF TEXAS INDEPENDENT MOTOR CARRIERS

Alamo Express, Inc.; Alamo Motor Lines, a corporation; Arledge Transport Co., Inc.; Associated Transport, a corporation; Tom Aycock, doing business as Tom Aycock Transport Company; Basse Truck Lines, Inc.; Brown Express, a corporation; Bulldog Transport Company, a corporation; Cactus Transport, a corporation; Caddell Transit Corporation, a corporation; Aaron Carthel, an individual; Central Forwarding Inc.; Central Freight Lines Inc.; Chemical Transports, Inc.; Cody and Teague Transport, Inc.; E. R. Compton, W. S. Compton and Mrs. M. D. Compton, doing business as Compton Transport Company; H. C. Denson, doing business as H. C. Denson Trucking Company; East Texas Motor Freight Lines, a corporation; Ferguson-Steere Transport, a corporation; B. R. Gamblin, et al, doing business as Oil Transport Company; Thomas Graves, doing business as Thomas Graves Transport; Charles Herder, Jr., doing business as Herder Truck Lines; R. T. Herrin, an individual; John L. Hill, John L. Hill, Jr., and Laveren Collum, doing business as Hill Bros. Fuel Oil Company; Houston and North Texas Motor Freight Lines, Inc;

Mrs. Willie R. Hudson, doing business as Hudson Brothers; D. H. Jefferies, Inc.; Glen P. Mabry and

T. A. Panick, doing business as Air Speed Oil Company; Merchants Fast Motor Lines, Inc.; L. F. and F. D. Miller, doing business as Miller & Miller Motor Freight Lines; H. C. Morris and W. P. Price, doing business as M & P Transport Company; J. M. Rabon, doing business as Rabon Transport Company; Red Arrow Freight Lines, Inc.; Red Ball Motor Freight, Inc.; Robertson Auto Transport Company, a corporation; Robertson Transports, Inc.; Ray Rollen and T. L. Rollen, doing business as C & R Transport Company; E. W. Schenecker and J. R. Boswell, doing business as Commercial Oil Transport; Sellars Oil Transports, Inc.; E. P. Shaw, doing business as Shaw Transports; B. B. Slimp and F. A. Slimp, doing business as Highland Transport Company; Ray Smith Transport Co., a corporation; Snowden Transport Co., a corporation; Southern-Plaza Express, Inc.; Southwestern Motor Transport, Inc.; Sunset Motor Lines, a corporation; Tank Lines, Inc.; The Transport Company of Texas, a corporation; Triple "A" Transport Company, a corporation; Art Tucker, doing business as Art Tucker Transports;

Union Transports, Inc.; Western Oil Transportation Co., Inc.; Western Petroleum Transport Corp.; J. T. Whitehurst and Garland Clymore, doing business as Coastal Transport Company; Robert P. York, doing business as York Transport Company; Mrs. Bess F. Young, doing business as Young's Motor Freight Lines; and Younger Bros. Inc.

Office Supreme Court, U.S.
FILED
OCT 23 1957
JOHN T. FEY, Clerk

No. 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

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October 23, 1957

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PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association", is a voluntary organization, the membership

of which embraces the members of the railroad and public utility regulatory commissions and boards of all the 48 States of the United States. By the Constitution of the Association its attorneys may be directed to appear on behalf of the Association (as distinguished from the individual commissions within its membership) in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the Association should be made.

On July 26, 1956, the Association, in annual convention, duly adopted the following resolution

RESOLUTION IN SUPPORT OF FEDERAL AND STATE REGULATORY JURISDICTION OVER RATES CHARGED BY COMMON CARRIERS FOR TRANSPORTATION SERVICES RENDERED TO AGENCIES OF THE FEDERAL GOVERNMENT

Whereas, There is now before the National Congress H. R. 525 (the so-called Hinshaw Bill) a bill to repeal Section 22 of the Interstate Commerce Act which section now, in effect exempts from federal regulation rates on transportation performed for agencies of the Federal Government; and

Whereas, The provisions of Section 22 of the Interstate Commerce Act are made applicable to transportation by motor and water carriers and freight forwarders by reference in Parts 2, 3 and 4 of the Interstate Commerce Act; and

Whereas, The substantial and continuing abuse by agencies of the Federal Government of the provisions of this section of the Interstate Commerce Act has fostered unfair and destructive competitive practices among common carriers in violation of the specific terms, as well as the intent, of the National Transportation Policy; and

Whereas, It is the general feeling among shipping interests in all industries that it is wrong for the freight of the Government to be handled by common carrier transportation companies at less than the tariff rates charged other shippers under similar conditions; and

Whereas, The unwarranted lack of federal control over interstate transportation rates of common carriers when transporting for agencies of the Federal Government has fostered in such agencies an increasing disregard for the authority of the State regulatory bodies to such extent that such Government agencies are demanding from common carriers secret, sealed competitive bids for intrastate transportation in open violation of the rules and regulations of many State Commissions and the laws of those States; and

Whereas, Attempts by the individual States to preserve their rights to regulate intrastate transportation provided by common carriers to the Government agencies have resulted in the United States Department of Justice actively initiating or supporting or offering to support legal actions seeking to defeat State regulatory supervision of such transportation by such carriers; and

Whereas, Such legal proceedings have already in California and Texas resulted in decisions unfavorable to State regulatory authority; and

Whereas, The just and fair State regulation of common carriers providing service to the Government Agencies, including the Military Services, could have no bona-fide adverse effect on the national defense in peace time and could and would be overridden by proper Federal authority —without protest on the part of the States—in time of war or other national emergency; and

Whereas, Unified action of the States appears to be urgently needed to resist these unwarranted attempts to evade state authority;

Therefore Be It Resolved, That the National Association of Railroad and Utilities Commissioners supports the repeal of Section 22 of the Interstate Commerce Act (and related sections in Parts 2, 3 and 4 of such Act) as proposed in H. R. 525, providing however, such safeguards, if any, which may be necessary to guard against diversion of government traffic from regulated common carriers to unregulated carriers to the end that the movement of government traffic under secret, unknown and unpublished rates and charges will be discouraged; and

Be It Further Resolved, That the Association strongly opposes the actions of agencies of the Federal Government in advocating, promoting and supporting the evasion of state authority under the nebulous and wholly fictional claim of possible potential interference with the national defense; and

Be It Further Resolved, That the Association intervene in any proceeding before the Supreme Court involving the potential loss by a State of its regulatory powers in this field; and

Be It Further Resolved, That the attorneys for the Association be authorized to appear before the proper Congressional committees and otherwise to transmit to the Congress the intent of this Resolution.

This Association's interest in this proceeding is on behalf of the state commissions and boards represented in the membership of the Association, which agencies are charged by state laws with the duty of

regulating the intrastate rates and service of the railroads operating within their respective states.

STATEMENT OF THE CASE

In July, 1955, the Legislature of the State of California amended section 530 of the Public Utilities Code of the State of California. The amended section empowers the California Public Utilities Commission "to permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable."

On December 2, 1955, the United States filed a complaint in the United States District Court for the Northern District of California, Southern Division, to have the Court declare section 530 of the Public Utilities Code unconstitutional and to enjoin the California Public Utilities Commission from taking any action under this section.

On June 5, 1956, the District Court ordered, adjudged and decreed:

> "1. Insofar as section 530 of the Public Utilities Code of the State of California purports to authorize the Public Utilities Commission of California to impose 'such conditions as it may consider just and reasonable' upon the granting of reduced rates by commercial carriers in favor of the United States, it is invalid, void and of no effect as contravening the provisions of article I, section 8, clauses 11, 12, 13, 16 and 17, and article IV, section 3, clause 2, of the Constitution of the United States.
>
> "2. Defendant Public Utilities Commission of the State of California and its agents and em-

ployees are hereby permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of California from entering into special arrangements with respect to rates for the transportation of property of the United States." (141 F. Supp. 168)

The California Public Utilities Commission appeals, herein, that decision of the District Court.

STATEMENT OF POSITION

The Solicitor General of the United States and the Public Utilities Commission of the State of California have consented to the filing of this brief as amicus curiae pursuant to Rule 42 of the Revised Rules of the Supreme Court.

The National Association concurs in and endorses the position taken by the California Public Utilities Commission; namely, that:

The District Court did not have jurisdiction to entertain the complaint.

(1) The complaint did not allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201.

(2) The Plaintiff (Appellee) failed to exhaust the administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California.

(3) The complaint involved a matter which is within the primary jurisdiction of the Public Utilities Commission as an administrative agency of the State of California.

(4) The District Court was prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff (Appellee).

(5) The complaint did not allege facts showing irreparable injury to the Plaintiff (Appellee) in the absence of injunctive relief.

(6) The Plaintiff (Appellee) had an adequate remedy elsewhere than in the District Court.

(7) The District Court was required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California.

However this brief is directed to what has been ermed the ultimate question—"Does the State of alifornia have the lawful power to regulate the ntrastate rates of carriers for the transportation of roperty of the United States between points in the tate of California and do the action and judgment f the District Court violate the Tenth Amendment to he Constitution of the United States?"

The National Association contends that a State can wfully regulate the rates for the intrastate trans- ortation of property for the United States.

ARGUMENT

State Regulation of the Rates for Intrastate Transportation of Property for the United States Is Not Unconstitutional

The District Court's opinion covers a history of the proceeding, an extended discussion of the testimony of the witnesses, and a response denying each of the preliminary questions raised by the California Public Utilities Commission, but fails to discuss the ultimate question other than to brush it off under the heading "Conclusion" with the statement, "We dare not, in good conscience and under the Constitution of the United States, deny relief to such a suitor when it proves to our satisfaction that such denial would hamper the national defense."

If this blankly-stated conclusion were true in fact and in law, this Association would not support for a minute the proposition of State regulation at the sacrifice of national defense. Rather, we feel that the statement exhibits a complete lack of understanding of the problem of intrastate rate regulation of Government transportation.

Under section 530 of the California Public Utilities Code, as is also the case under the statutes of most of the other states, carriers may transport property for the Government, at rates provided in their tariffs on file with the Commission and applicable to regular commercial shippers. The problem, in final analysis, becomes one of cost.

The Federal Government should have as great, if not greater, interest in preserving an adequate system of transportation and the National Transportation Policy as should commercial shippers. The practice of free or reduced rates for Government transporta-

tion has met with considerable dissatisfaction because of the evils and abuses which it has created. ("A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization", April 1955; "A Report to Congress by the Commission on Organization of the Executive Branch of the Government", March, 1955; "Report on Transportation Prepared for the Commission on Organization of the Executive Branch of the Government by the Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense", March, 1955; Hearings on H. R. 525 before the House Committee on Interstate and Foreign Commerce—84th Congress, September 19-22, 1955; Hearings on S. 939 before the Senate Committee on Interstate and Foreign Commerce—85th Congress; and Hearings on H. R. 3233 before the House Committee on Interstate and Foreign Commerce —85th Congress.)

The House Committee on Interstate and Foreign Commerce has stated:

> "The committee is convinced that common carriers should no longer be permitted to grant rate and fare concessions to the United States, State, or municipal governments. This practice is discriminatory, wasteful, and contrary to the public interest." (House Report No. 2633 to accompany H. R. 525—84th Congress, p. 4)

These ill effects of free or reduced rates for the transportation of property for the United States must be weighed against any cost effect.

As to the matter of cost itself, this Court has stated:

> "We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as a purchaser, which have the effect of increasing cost." *Penn Dairies* v. *Milk Control Com.*, 318 U. S. 261, 273.

Article I, Section 8, clauses 7, 12, 13, 16 and 17 of the Constitution of the United States empower Congress to establish post offices and post roads, to raise and support armies, to provide and maintain a navy, to provide for the militia, and to exercise exclusive legislation over the District of Columbia and certain Federal installations.

These clauses do not state that such instrumentalities will be provided at the lowest possible cost notwithstanding state laws. On the contrary, the Constitution creates and recognizes our dual form of government. These same clauses were the foundation of the United States' contention in the *Penn Dairies* case, supra, wherein this Court stated:

> "But there is no clause of the Constitution which purports, unaided by congressional enactment, to prohibit such regulations." p. 269

The Court stated further:

> "As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise

of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see Baldwin v. G. A. F. Seelig, Inc., 294 US 511, 79 L ed 1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v. King & Boozer, 314 US 1, 86 L ed 3, 62 S Ct 43, 140 ALR 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A. R. Co. v. Lichtenberg, 176 Md 383, 4 A(2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in James Stewart & Co. v. Sadrakula, 309 US 94, 84 L ed 596, 60 S Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation, like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see Metcalf & Eddy v.

Mitchell, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see Graves v. New York, 306 US 466, 483, 487, 83 L ed 927, 934, 937, 59 S Ct. 595, 120 ALR 1466."

Whatever immunity the Federal Government may have, it is obvious, does not extend to the common carriers who perform transportation services for the government.

In its recital of the testimony presented by the United States, the District Court reviews the logistic problem embraced in the military's world-wide operations, and the security problem. In *United States* v. *Pennsylvania P.U.C.*, Superior Court of Pennsylvania, No. 27, October Term, 1955, Decision dated September 30, 1957, the Pennsylvania Court gives a very logical and realistic answer to these allegations:

"'The United States contends, however, that the particular nature of this transportation indicates that state regulation of the rates imposes an unreasonable burden upon the Federal Government. It is argued that the lines of supply of the United States are highly integrated and synchronized to operate on a world-wide basis, and that any local interference with that system is improper. In the present case we are concerned only with shipments which originate and terminate within the Commonwealth of Pennsylvania without crossing state lines. It is purely an intrastate transportation. When considered in the over-all govern-

mental picture, it may have some relationship to the world-wide and national programs, but this fact alone does not make the obligation to pay established rates for transportation an unreasonable burden.

. . . . . .

". . . . the United States also contends that, since certain shipments of military material may be of a secret nature, the requirements of filing rates for shipment thereof with the commission may require revealing the nature of the shipment or its secret destination. In such instances the Federal Government would not be obliged to reveal to the commission any more information than it would ordinarily reveal to the carrier which is to transport the property. The regulation of rates for carriage does not require any breach of security or the extended dissemination of information which might lead to a breach of security."

There is nothing in the vague and general allegations of the United States to show how State regulation of the rates for intrastate transportation of property for the United States places an unreasonable burden and impediment on the power of Congress.

Nor has Congress attempted to set aside or prohibit State regulation of the rates for such transportation. The fact that section 22 of the Interstate Commerce Act, 49 U.S.C.A. 22, permits interstate shipments for the Federal Government to be handled free or at reduced rates does not indicate a congressional policy that intrastate shipments with respect to rates be free of local regulation. On the contrary, the Interstate Commerce Act recognizes State regulation of rail-

roads (sec. 1(17)(a)) and motor carriers (sec. 202(b)).

Neither the Armed Services Procurement Act of 1947 (41 U.S.C.A. Sec. 151-162) nor the Federal Property and Administrative Services Act of 1949 (40 U.S.C.A. Sec. 481(a)) change the congressional policy recognizing state regulation of transportation agencies. The former was under consideration in the *Penn Dairies* case, supra, wherein the Court stated that the Act did "not purport to set aside local price regulations."

The latter Act provides in section 481(a)(4):

> "With respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies; . . ."

And the Federal Government has appeared before the State regulatory commissions in numerous rate-making proceedings.

It has been the continued and established policy of Congress throughout these acts to recognize state regulation, and there is no indication that Congress has at any time implemented its constitutional powers in a manner designed to bypass state regulation of rates for intrastate shipments of property for the United States.

The judgment of the District Court below decreed that insofar as section 530 of the Public Utilities Code of California purports to authorize the California

Commission to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates for the intrastate transportation of property for the United States it is unconstitutional. Upon this premise, the Court enjoined the Commission from interfering with the United States and the carriers from entering into special arrangements with respect to rates for the transportation of property of the United States.

The injunction is much broader than the issues in the case. The injunction would cover non-military as well as military shipments. The injunction might be construed to cover not only shipments of military property for the United States but also shipments of household goods of Armed Forces personnel which are arranged for by the Government but are not property of the United States.

The ultimate question is one that is of substantial interest. The problem of state regulation of the rates for intrastate transportation of property for the United States has arisen in several states and is pressing in others. The question is presently under litigation in Texas and Pennsylvania and in the U. S. Court of Claims. And particularly as to the movement of household goods of government employees, it has become acute in other states.

The District Court found that there "is a constitutional difference between a can of milk and a hydrogen bomb." Yet the breadth of the injunctive relief granted by the District Court would cover the "can of milk" as well as the "hydrogen bomb", so the District Court fails to find the constitutional difference which it asserts exists. Its injunction covers not only "the

engines of war") but also non-military shipments, including, possibly, a can of milk for a sergeant's baby if included among some household goods being shipped from one military post to another.

CONCLUSION

It is respectfully submitted that the District Court was in error in adjudging that the California Public Utilities Commission does not have the power to regulate the rates for the intrastate transportation of the property for the United States; and in failing to follow the opinion of this Court in the *Penn Dairies* case. Accordingly, the judgment should be reversed.

Respectfully submitted,

AUSTIN L. ROBERTS, JR.
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Attorneys for the
National Association of Railroad and Utilities Commissioners, amicus curiae

October 23, 1957

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing by first-class mail, postage prepaid, a copy thereof properly addressed to each such party.

Dated at Washington, D. C., this 23rd day of October, 1957.

AUSTIN L. ROBERTS, JR.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 23

On Appeal from the United States District Court
for the Northern District of California,
Southern Division

APPELLANT'S PETITION FOR REHEARING AND CLARIFICATION.

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APPELLANT'S PETITION FOR REHEARING AND CLARIFICATION.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Appellant files this its petition for rehearing and clarification respecting the decision of this Court rendered herein on March 3, 1958.

I.

THE FINDING BY THE LOWER COURT, UPON WHICH THIS COURT RELIED, THAT AN OFFICER OF THE UNITED STATES WHO NEGOTIATED WITH A CARRIER FOR REDUCED RATES WITHOUT PERMITTING THE PUBLIC UTILITIES COMMISSION TO DETERMINE THE REASONABLENESS OF SUCH REDUCED RATES COULD BE THROWN INTO THE COUNTY JAIL IS NOT SUPPORTED BY EVIDENCE AND IS CONTRARY TO THE PRIOR DECISION OF THIS COURT.

It is difficult to understand how this Court could seriously rely upon the provisions of Section 2112 of the Public Utilities Code or any other penal provision of that code to justify the invalidation of the 1955 amendment to Section 530 of said code. Apparently, this Court relied upon the finding of the lower court that an officer of the United States could be thrown into the county jail if he negotiated reduced rates with a carrier without securing the approval of the Commission. This finding of the lower court is based upon no evidence other than the language of Section 2112. There was not shown any threat, expressed or implied, that the responsible officer of the State of California would take any such action. The record is totally barren of any such threat. On the contrary, the responsible officer of the State of California stipulated that no such action would be taken. (pp. 4-7, Appellant's Reply Brief.) This case being an action in equity, the state of the record before this Court at the date of the argument is controlling. (*Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456, 466, 87 L. ed. 396, 402.)

Not only is the record barren of any threat, expressed or implied, of such action, the record shows a complete negation of any such action.

The undersigned Attorney for the Commission is charged with the duty of initiating penal action against any violator of the penal provisions of the Public Utilities Code. His authority derives from several sections of said code but principally from Section 307, thereof, which reads as follows:

> "The commission may appoint as attorney to the commission an attorney at law of this State, who shall hold office during the pleasure of the commission. The attorney shall represent and appear for the people of the State of California and the commission in all actions and proceedings involving any question under this part or under any order or act of the commission. If directed to do so by the commission, he shall intervene, if possible, in any action or proceeding in which any such question is involved. The attorney shall commence, prosecute, and expedite the final determination of all actions and proceedings directed or authorized by the commission; advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof; and generally perform all duties and services as attorney to the commission which the commission may require of him."

Surely, such a stipulation by the responsible law enforcement officer of California, if accepted by this Court, would remove any fear, real or fancied, entertained by any officer of the United States that he would be subjecting himself to penal sanctions if he paid a lesser rate for transportation than the rate approved by the Commission.

Over and above the foregoing, the case law holds that, absent a specific statutory prohibition to that effect, the

mere purchase of an illicit commodity constitutes no crime, even though the purchaser knew it was illicit and the seller commits a crime in so selling the commodity. (*United States v. Farrar*, 281 U.S. 624, 634, 74 L. ed. 1078, 1081.) Unless there is shown some active conspiracy or aiding and abetting, there could be no crime. The mere purchase does not constitute either conspiracy or aiding and abetting.

With all due respect to the lower court, its finding that an officer of the United States could be thrown into the county jail for negotiating reduced rates with a carrier without the approval of the Commission is contrary to the law and the evidence and is a mere makeweight.

II.

RELIANCE BY THIS COURT UPON THE TESTIMONY OF OFFICERS OF THE ARMED FORCES, WHOLLY AT VARIANCE WITH THE VIEWS EXPRESSED BY THE SECRETARY OF DEFENSE, WAS UNJUSTIFIED.

There can be no doubt that this Court placed great reliance upon the testimony of these officers of the Armed Forces in arriving at its decision. In light of the contrary view expressed by their superior, the Secretary of Defense, in the Weeks' Report, this Court should have disregarded this testimony. (pp. 116-117, Appellant's Brief.) Surely, this Court was not entitled to disregard the contrary view of the responsible political head of the Department of Defense. Neither was this Court required to accept uncritically the testimony of these officers of the Armed Forces when human nature, necessarily, dictates

a bias on their part against any interference with what they believe to be desirable. *There is a military mind.*

The witness Lasher, whom this Court quoted, admitted that his view was contrary to that of the Secretary of Defense. (p. 117, Appellant's Brief and R. 426.) Lasher's view was merely echoed by the other Armed Forces witnesses.

We are reminded, in this regard, of an incident occurring at the Versailles Peace Conference following World War I. After prolonged debate by the delegates a particularly difficult question remained unresolved. A delegate, thereupon, inquired if the military had been consulted. Quickly, Lloyd George replied: "This is far too important a question to be decided by soldiers." We submit that this principle well could be applied here.

The Hoover Commission report clearly contradicts the testimony of these witnesses from the Armed Forces. (pp. 116-117, Appellant's Brief, and R. 422-429, 579, 580, 588-591, 606-612, 865-957.) Are we to accept the views of military men in preference to the considered judgment of the responsible civilian heads of the executive departments of the United States?

The claimed difficulties, obstacles and objections put forward by these officers of the Armed Forces are the ancient objections against any regulation at all. The history of regulation of transportation rates abounds with these same objections. They are commonplace and were put forward years ago without success. The only new objection is the one regarding security which could be and would be obviated by the complete exemption of traffic involving security.

At pages 5 and 6 of the dissenting opinion (pamphlet copy) there are pointed out sufficient answers to these manifold objections to the California statute which were advanced by the several witnesses from the Armed Forces. It is simply unrealistic to say that the State of California could not meet the objections raised by these witnesses, that is, within permissible constitutional limits. Those of us who have experienced many years of regulation and also who have served a number of years in the Armed Forces of the United States know that much of the testimony given by these witnesses from the Armed Forces is exaggerated beyond reality. (pp. 89-124, Appellant's Brief.)

Of course, claimed military necessity could have no possible application to the great mass of non-military traffic for the civilian agencies of the United States and similar traffic for the Armed Forces.

Would this Court have decided this case as it has had there been involved only non-military traffic for a civilian agency of the United States?

III.

THE DECISION IN THE INSTANT CASE, LAWFULLY, CANNOT BE RECONCILED WITH THE THREE STATE TAX DECISIONS DECIDED THE SAME DAY, AND PARTICULARLY CITY OF DETROIT v. MURRAY CORPORATION, 355 U.S. .....

We heartily agree with Mr. Justice Harlan and his colleagues in their dissent wherein they point out the inconsistency between the instant decision and the decision

in *City of Detroit v. Murray Corporation*, 355 U.S.....,
decided the same day.

It is unanswerable, as pointed out in the dissenting opinion, that there is no constitutional distinction between state regulation of the price of milk the United States must buy and the price which the United States must pay to ship the milk it has bought; neither, from an economic standpoint, could there be any distinction made between a can of milk and a hydrogen bomb.

The following quoted language from the prevailing opinion (pamphlet copy) in this case is, in our opinion, unreconcilable:

> ". . . *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' *Id.*, at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. . . ." (p. 9.)

It will be noted that this Court stated in the *Penn Dairies* case that the Pennsylvania regulation did not impose a prohibition on the national government or its officers. However, in the instant decision this Court holds that the regulation of intrastate transportation rates by California places a prohibition on the Federal government and further states that the conflict between the federal policy of negotiated rates and the state policy of regulation of

negotiated rates "seems to us to be clear." If state regulation of the price of milk is valid against the Federal government and imposes no prohibition on that government or its officers, how can it be said that state regulation of the price of transportation services performed for the Federal government does exactly the opposite? *Where is the constitutional difference? Penn Dairies* is, impliedly, overruled. We are unable to see the applicability of the cases of *Arizona v. California, Leslie Miller v. Arkansas*, and *Johnson v. Maryland*, which are cited by this Court at page 9 of the prevailing opinion (pamphlet copy.)

Clearly, in this highly sensitive and delicate area of government the instant decision has overlooked that fundamental principle of indulging every lawful presumption in support of the constitutionality of a state statute.

We respectfully submit that if the same approach, which was used in the case of *City of Detroit v. Murray Corporation*, had been employed in the instant case, *the decision herein would have been in support of state authority.*

At page 3 of the prevailing opinion in the case of *City of Detroit v. Murray Corporation* (pamphlet copy), the following language appears:

> ". . . However in passing on the constitutionality of a state tax 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to sub-

stance. This is at least as true to uphold a state tax as to strike one down. . . ."

We wholeheartedly agree with the foregoing stated principle and approach in determining the constitutionality of a state statute. It is most respectfully contended that the foregoing stated principle was not applied in the decision involving the California statute here involved.

IV.

THE RULE REQUIRING EXHAUSTION OF THE ADMINISTRATIVE REMEDY WAS APPLICABLE TO THE INSTANT CASE.

Nothing said in the decision of this Court, in our opinion, justifies the disregarding by this Court of the rule of exhaustion of administrative remedies. What possible harm could ensue if such rule were followed? The status quo would be maintained and the state statute would be interpreted by those best qualified to interpret it, subject to final review by this Court. Is it asking too much to permit state authority to exhaust its jurisdiction where federal authority could not possibly be prejudiced by so doing?

We respectfully contend that the decision of this Court has roughly handled state authority and has taken action not at all in keeping with that spirit which underlies our dual system of government.

V.

APPARENTLY, THE INSTANT DECISION HOLDS THAT THE STATE STATUTE, HERE INVOLVED, IS UNCONSTITUTIONAL ON ITS FACE AND, ALSO, THAT THE SEVERAL ACTS OF THE CONGRESS REFERRED TO IN SAID DECISION INVALIDATE SAID STATUTE.

Appellant requests the Court to clarify its decision on the proposition advanced in the foregoing heading. Does the Court hold that the statute is unconstitutional on its face and, also, that the several acts of Congress, referred to in said decision, together with departmental regulations promulgated thereunder, invalidate said statute?

We contend that these Congressional acts and the regulations promulgated pursuant thereto are more consistent with the United States paying tariff rates than they are with a policy requiring the negotiation of rates. (pp. 9-29, Appendix B, Appellant's Brief.) But even conceding for the sake of argument a Congressional policy to *permit* Federal transportation officers to negotiate with carriers for rates more favorable to the Federal Government than established tariff rates would be, *nevertheless such would not be inconsistent with State regulation of such rates.* Private commercial shippers are continually negotiating with carriers in an effort to obtain for themselves rates more favorable than presently established rates. To be sure, the more favorable rates, if agreed upon, are subject to review by the appropriate regulatory body; but the existence and exercise of regulatory power have never foreclosed or impeded negotiation upon the subject of transportation rates.

Appellant respectfully suggests that one of the major fallacies of the majority opinion is its conclusion that the

claimed Federal policy permitting negotiation of rates is inimical to State regulation. At page 2 of the dissenting opinion (pamphlet copy) the fact is pointed out that the statutes and regulations relied upon by this Court as a manifestation of Congressional intent to displace state economic regulation are substantially the same as those found wanting in this respect in the *Penn Dairies* case, 318 U.S. 261. At page 275 of the U.S. Reports, this Court observed as follows with regard to the effect of these Congressional enactments and regulations promulgated pursuant thereto:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication [citing cases] should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

49 U.S.C. 65 clearly supports a Congressional policy of paying tariff rates. (p. 9, Appendix B, Appellants' Brief.) This is the policy expressed by the Congress of the United States. Surely, the policy established by the Congress of the United States should take precedence over any views expressed by officers of the Armed Forces.

In the footnote at page 8 of the prevailing opinion (pamphlet copy) this Court states that 49 U.S.C. 65, applies only to rates fixed by the Interstate Commerce Commission and is made expressly subject to Section 22 of the Interstate Commerce Act. This may well be true (except as applied to the last proviso of Section 65(a)) but it

does not negative in any way the fact that the Congress of the United States has therein expressed its policy to pay tariff rates for transportation of government property. What Section 65 seeks to do is to declare that there is no *prohibition* or policy against the paying by the United States of tariff rates. The reason that Section 22 is referred to in Section 65 is to make it clear that Section 22 has not been repealed by implication. Surely, the Congress would make no distinction between interstate and intrastate rates so far as a policy of paying tariff rates may be concerned. Land grant rates were not confined exclusively to interstate rates but applied to intrastate rates as well. Furthermore, the California statute, here concerned, applies to railroad freight rates as well as to truck rates and other common carrier freight rates, that is, as applied to intrastate commerce. The last proviso in Section 65(a) refers to all transportation services purchased by the United States and is not confined to carriers subject to the Interstate Commerce Act.

VI.

DOES THE DECISION OF THE COURT APPLY TO NON-MILITARY TRAFFIC FOR THE ARMED FORCES AND TO NON-MILITARY TRAFFIC FOR THE CIVILIAN AGENCIES OF THE UNITED STATES?

We agree with the view expressed in the dissenting opinion that the decision of the Court does extend to all government traffic. There is nothing in the decision which indicates the contrary. It is most important that regulatory officials throughout the United States be informed as to the scope of the decision here involved. Therefore,

we ask the Court to clarify this particular question. One of the reasons why the request is made is because great stress has been placed by this Court upon military necessity to support the judgment of the lower court; yet the decision would appear to extend to any and all traffic of the United States, military necessity to the contrary notwithstanding.

We assume that the decision makes no distinction between time of war and time of peace.

VII.

DOES THE DECISION OF THE COURT APPLY TO ALL OTHER REGULATED SERVICES SUCH AS TELEPHONE, TELEGRAPH, GAS, ELECTRIC, WATER AND WAREHOUSE SERVICES?

If the decision of this Court is to be applied to any and all transportation services purchased by the United States, it would be difficult to understand why it would not apply to all other regulated services such as telephone, telegraph, gas, electric, water and warehouse services. It is very important that regulatory officials be informed whether or not the instant decision covers the services enumerated. Therefore, we request this Court to clarify its decision in this regard.

VIII.

CONCLUSION.

By covering the points which we have covered in this petition for rehearing, we do not wish it understood that we have abandoned any of the propositions put forward by us in our brief and reply brief filed in this Court.

We reassert each and every proposition there advanced by us but confine our specification in this petition for rehearing to the foregoing points stated herein.

We are fully aware that the citation of the Tenth Amendment to the Federal Constitution is considered, now-a-days, as old-fashioned and unrealistic. With that view we strongly disagree. We believe that the Tenth Amendment is one of the firmest pillars supporting the edifice of constitutional government. That amendment is one of the reasons which justified Gladstone's statement that the Constitution of the United States is the most wonderful work ever struck off at a given time by the brain and purpose of man. It is most respectfully suggested that the spirit of the Tenth Amendment is absent from the instant decision. We plead for the infusion of that spirit.

Decisions such as the instant one, we respectfully contend, constitute mortal blows to the sovereignty of the several states and tend to degrade and dilute state authority in all departments of our governmental polity.

California pleads for constitutional tolerance and for that wise accommodation of the respective interests of the general government and the governments of the several states of which Jefferson and Madison so often spoke. We ask this Court to hearken unto the advice and wisdom of Thomas Jefferson and James Madison, and permit California the opportunity to demonstrate that it can administer this statute within the framework of the Federal Constitution.

Is it to be supposed that the Federal government believes that these carriers of freight, with whom it desires

to deal directly, will be more sensitive and alive to the interest of the Nation than would be the officers of the State of California; or, rather, is it not that the general government desires to deal directly with these carriers for the purpose of securing depressed rates by playing off one carrier against the other and thus engendering cutthroat competition, preference and prejudice, evils which regulation was principally designed to prevent? The record in this case abundantly shows that the officers of the United States have engaged in this type of conduct. (R. 870, 872, 894-900, 905-906; 933-934, 950-951, 956, 961-965, 969-970.)

Surely, it ought not to be feared that a contrary decision to the instant one would work irreparable harm when it is realized that the public servants of California are as patriotic and as alive to the interests of this Nation as are any of those who appeared for the United States in this litigation. Whereas, on the other hand, if this decision is allowed to stand state authority will be driven forever from the rate regulatory field where transactions with the United States are involved. As we read the all-embracing language of the decision of this Court, it holds all state regulation in that field unconstitutional by virtue of the Federal Constitution unaided by Congressional implementation.

We repeat here what this Court stated in the celebrated case of *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, that—

> ". . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

Also, we desire to remind this Court of its statement in *Penn Dairies, Inc. v. Milk Control Commission,* 318 U.S. 261, 275, 87 L. ed. 748, 756, that—

> ". . . we should be slow to strike down legislation which the state concededly had power to enact because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

WHEREFORE, Appellant prays that this Court grant a rehearing in this case and set aside its decision and take such action as will permit state authority to maintain its jurisdiction over the subject matter of the instant case.

Dated, San Francisco, California,
March 20, 1958.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Everett C. McKeage, Attorney for the Public Utilities Commission of the State of California, Appellant herein, hereby certify that this petition for rehearing is presented in good faith and not for delay, being of the opinion that substantial questions of both law and fact are presented by said petition.

Dated, San Francisco, California,
March 20, 1958.

EVERETT C. MCKEAGE,
Chief Counsel,
Public Utilities Commission
of the State of California.